STALIN'S AMERICAN VICTIMS
PETER DAY

the weekly
Standard

JANUARY 4 / JANUARY 11, 1999 $3.50

TRIAL *of the* CENTURY

THE EDITORS ON Why It Must Proceed

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TOD LINDBERG ON Chief Justice Rehnquist

DAVID LOWENTHAL ON the High Crime of Perjury

SPECIAL BOOKS SECTION

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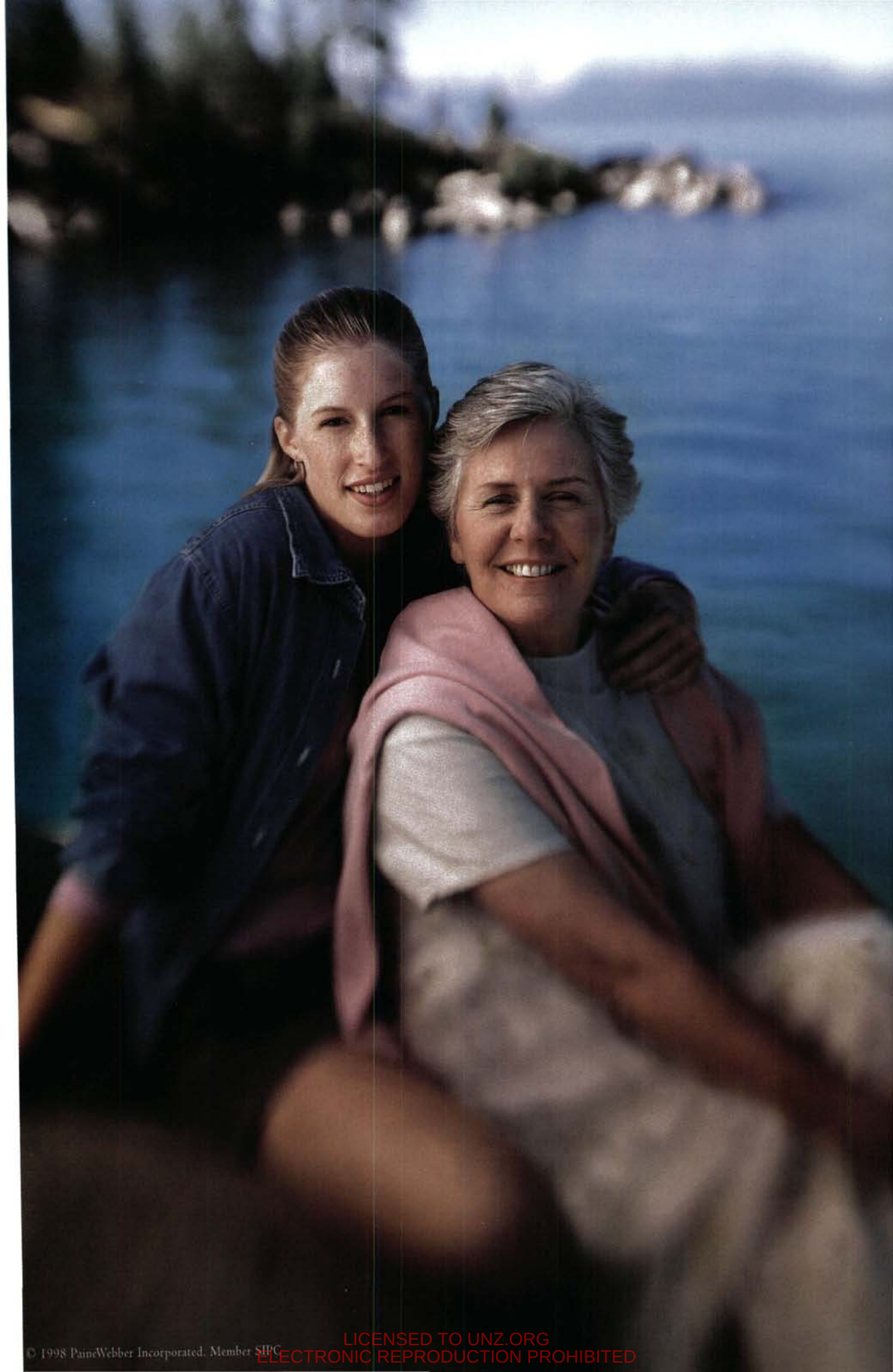

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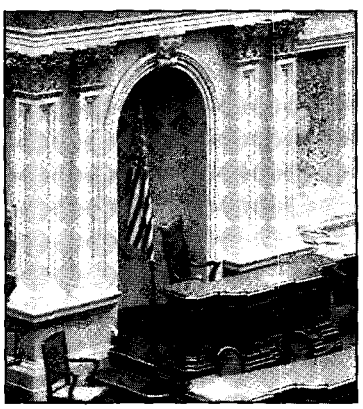

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BPA INTERNATIONAL

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The Clinton-Flynt Democrats

The enduring political photo of 1998 will be the one of the president on his trip to Africa, caught unawares by a TV camera as he triumphantly chews a stogie and pounds a tom-tom drum to celebrate the end of Paula Jones's sexual harassment lawsuit. It is—or should be—an enduring image because it so vividly captures Bill Clinton's boundless arrogance and contempt for the truth.

The day after he was impeached, the president was caught in a similarly unguarded moment by *Los Angeles Times* reporter Elizabeth Shogren at a White House Christmas party.

The evening before, surrounded by House Democrats at his impeachment rally, the president had unctuously asked that we "get rid of the poisonous venom of excessive partisanship." Now, Shogren reported, the president "laughed about the fact that Larry Flynt, publisher of *Hustler* magazine, had become the latest influence on the Washington political debate. . . . Clinton regaled his listeners with a description of a letter that Flynt wrote to independent counsel Kenneth W. Starr—whose investigation of Clinton's affair with Lewinsky led to his impeachment—congratulating Starr for aiding the cause of pornography."

Not surprisingly, Clinton flack Joe Lockhart was pursued on this subject the following day at the daily White House press briefing. The transcript is amusing:

> QUESTION: Joe, since you and the president and others have called for an end to the politics of personal destruction, is the president prepared to call Larry Flynt and James Carville and others who are vowing to pursue those who supported impeachment?
>
> LOCKHART: Well, I—I'd hardly put Larry Flynt and James Carville in the same category. But—but . . .
>
> QUESTION: Why?
>
> LOCKHART: Let me take this—I don't think we have any control over what a—a newsmagazine publisher does. I think, Wolf, you would be . . .
>
> QUESTION: A newsmagazine?
>
> LOCKHART: I'm sorry, a magazine . . . what a magazine publisher does. I mean, that—you can't expect him to get personally involved in that.

No, of course not. As it happens, Lockhart serves an administration notorious in Washington for its constant efforts to shape the news by complaining to, even browbeating, the executives of newsmagazines and television networks, but one takes his point. The next day Lockhart finally issued a lame statement criticizing Flynt. But Carville and the private investigators continue on unrebuked.

"The President Falls Off a Mountain"

Not long ago, the executive director of Boys Town USA, Fr. Val J. Peter, felt compelled to write a letter to the boys and girls in his charge about the recent goings-on in Washington. "If you are old enough to know about these matters," Fr. Peter wrote, "then surely you are old enough to learn some lessons from them." The letter is a remarkable distillation of what is, and always has been, at stake in the Lewinsky scandal, and it's worth quoting at some length.

> "The main lesson is about lying. Everybody—and I mean everybody—can see that the President lied over and over again, and then lied to cover up the lying. Lying did not help him. It made things worse for him . . . much worse. If you lie, it will make things worse for you, too. . . . How is lying made worse? The bigger the role model, the worse the lie. If someone I hardly know lies to me, it is bad. But it is much worse if my mother lies to me. She is a much bigger role model in my life. That makes the lie worse.
>
> "That's why the President falls off a mountain when he lies. Yes, he falls a great distance. And if he lies over and over again, he falls an even greater distance. You may say if we raise the bar too high, no one will run for public office. Then all we will get is the biggest bully or the guy with the most money. That's really not our problem. The problem is just the opposite.
>
> "We need to raise the bar high enough so that better people will run for office. We need to restore the expectation that includes honest behavior. The solution is not to take the bar away. To put it another way, if many people are lying, the solution is not to approve of lying, but rather to rekindle the fires of devotion. Otherwise, human flourishing is diminished."

Spencer Tracy couldn't have put it better.

How Now Gray Wolf

When Henry Hyde dispatched those 81 questions from the House Judiciary Committee to the president last month, maybe he should have asked the Clinton

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administration's inquisitors at the U.S. Fish and Wildlife Service to toughen up the wording.

As Al Kamen reported in his *Washington Post* column, the shooting of a protected gray wolf in New Mexico led to an accusatory federal mailing to hunters in the area, who were threatened with investigation if they didn't fill out a form asking questions like these: "Do you know who shot the wolf? Did you shoot the wolf?" But the best was still to come. The questions ended with a Kafkaesque flourish: "How do you feel now that you have completed this form? Should we believe your answers to the questions? If your answer to the last question was yes, give us one reason why."

Your tax dollars at work.

Sorry, Sacagawea

Feminists have spent the past year in ideological contortions over President Clinton's transgressions, but that doesn't mean they've lost their voice on other important causes—like the decision by the U.S. Mint to terminate the failed Susan B. Anthony dollar coin and replace it with one bearing the image of Sacagawea, the 16-year-old female Indian guide and interpreter who traveled with Lewis and Clark on their westward expedition.

The first line of attack came from the National Organization for Women, which declared earlier this year that it opposed dislodging Susan B. Anthony. According to a NOW newsletter, the fear was that "a specific woman leader" would be replaced by an "abstract 'Liberty.'" Yes, this would have been an outrage.

Now that the mint is proceeding with Sacagawea, the line of attack has changed. The problem, according to a recent alert from the Washington Feminist Faxnet, is that the young Indian will appear on the coin carrying a child on her back (she was six months pregnant when the journey began). "WFF has nothing against kids," cautioned a December 11 fax from the group, "but a strong woman with a place in history that has nothing to do with motherhood should be shown as an individual. We don't see coins with George Washington or Abraham Lincoln stressing their role as fathers."

Ahhh, just when The Scrapbook was about to despair over the future of feminism.

Tale of Two Mayors

The new mayor of Washington, D.C., Anthony Williams, is planning a "common folks" inaugural party with "tickets cheap enough for everyone to afford." According to the account in the *Washington Post*, "Williams said he and his wife ... decided that the [last inaugural] parade wasn't well-attended," so they won't be having one.

Perhaps this is meant to strike a note of modest populism, as befits the almost-bankrupt municipal government of the nation's capital. Or maybe Williams is just shrewd. The very same day it reported Williams's plans, the *Post* also reported that the U.S. attorney's office has initiated a criminal probe into whether a star-studded, going-away gala for Barry in October was illegally paid for by the D.C. government.

Too bad there won't be a bigger party for Williams. The end of Washington's mayoral era of dashikis and Italian suits worn tie-less deserves some fanfare.

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Casual

GET YOUR *ALIENATION* HERE!

I spend part of my time in the art world and part sulking among technologists. The technology world has loads of energy but not enough ideas. The art world has ideas but not enough energy. The "conservative" art world is especially energy-deprived—the community that believes in the spiritual value of great art and literature; in works of art and literature for their own sakes, not as launch vehicles for ideological warheads. This view is not actually conservative, it's romantic, and has been at war with politicized art since before classical Athens. But nowadays its supporters are mainly conservative and it qualifies (in practice if not in theory) as the conservative view.

It has seemed obvious for a long time, to me and many other people, that the conservative (or romantic) art world ought to publish a New York books-and-arts weekly. New York is the center of American publishing and art, but the *New York Times* (with its Sunday book review and arts section) is the only serious force in the cultural marketplace. The *Times* is a liberal newspaper, and naturally covers culture with a liberal slant. It didn't ask for this monopoly position, and tries to be responsible and judicious in wielding its sumo-wrestler power. But the *Times* just isn't obliged to cover culture from a conservative viewpoint.

That responsibility belongs to conservatives. Today's conservative political magazines (like this one) offer superb, boffo back-of-the-book culture coverage—but are not in business to cover the book and art worlds in newsy detail.

The idea of creating this new weekly seems especially plausible right now, in the wake of the '98 elections—so promising of conservative alienation. Alienation leads to action. If conservatives feel sufficiently unloved, they'll do something to change the cultural landscape. If they are satisfied with the state of affairs, they'll sit back, have another drink, and go on doing nothing. The poll numbers on impeachment should be one more shot in the arm for conservative alienation: The Republican party has achieved new lows in public esteem; the president is aglow with popularity like a great marshmallow roasting in a merry campfire.

The time is right. But when I ask ranking conservative intellectuals why we can't have such a weekly, the number one response is: great idea; pathetically impractical. In the several years since I first posed the question, hundreds of new technology companies have been organized, business-planned, funded, staffed—and some have already bit the dust, and some have made it big. Creating a new culture weekly is a different proposition, but maybe not as different as people think. Many technology start-ups are funded by venture-capital firms, but many are backed by rich people, some of whom are searching not for more money but for excitement and a piece of the cultural action. They are approached on behalf of technology start-ups all the time. Why can't they be approached on behalf of revolutionizing the U.S. culture scene?

Let's say one of them funds the new weekly—call it *Alienation*. It publishes a few dozen book reviews in every issue, with art and music reviews and fiction and poetry interspersed, and an opening page of short apolitical essays that are so beautifully written, you can't stop reading once you start. Its goal is to publish for a fixed period, say two years, and then gracefully disappear. Its hero is Nanki Poo of Gilbert and Sullivan's *Mikado*, who volunteers to be executed in a month (thus satisfying a local affirmative-action quota) if only the authorities will grant him permission to marry his girlfriend and begin the honeymoon immediately.

After two years it's possible that another donor will step forward, or that the magazine will be nearing solvency. But as the lovely old folk-saying reminds us, "a water buffalo is unlikely to become airborne even if he spends two years barreling down the runway, and an arts weekly is unlikely to become self-supporting." So, let's assume it dies on schedule. Two steady years of heterodox culture coverage could galvanize the New York (and hence American) culture scene, which is full of people who are unhappy with the regime but lack a place to speak and an institution to rally round. Two years of leadership is enough to create a new movement and new cultural possibilities.

What would it cost? Assume that a reasonable number of copies are printed each week, on actual paper (none of this Web stuff). The bill might come to $15-$20 million for the whole thing. Small high-tech start-ups routinely raise that much in a second round of financing; some raise it in the *first* round. It's not such a fantastic sum.

It could work. Someone out there who is about to create yet another high-tech firm could simply organize a conservative books-and-arts weekly instead. Postpone getting rich for two years—big deal. Think it over.

DAVID GELERNTER

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Correspondence

The Law and Futile Care

I am very disturbed by Wesley J. Smith's comments about my husband Hugh Finn's case ("The Deadly Ethics of 'Futile Care Theory,'" Nov. 30/Dec. 7).

The Virginia Health Care Decisions Act allows an individual the right to discontinue medical treatment, including feeding and hydration, if it is determined that the person is in a permanent vegetative state and that, by a preponderance of evidence, either written or expressed, this would be the wish of the individual. In 1990, the U.S. Supreme Court's ruling in *Cruzan* deemed this right a constitutional liberty and expressly ruled it was *not* euthanasia. If Smith disagrees with the existing law, he should just say so, without victimizing me, a citizen who was completely within my legal right.

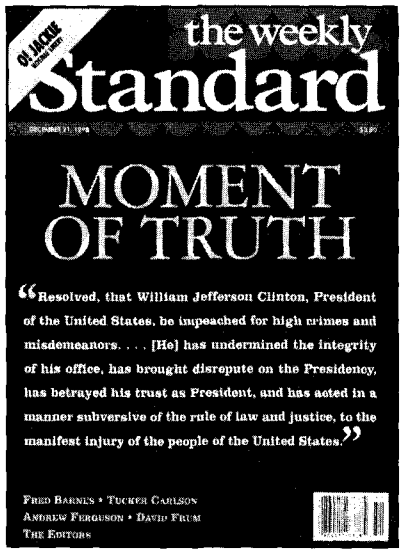
It is offensive that Smith instead chose to insinuate, by citing my husband's case, that the burden of proof regarding Hugh's wishes and his diagnosis of PVS were not met. My husband's case has been through eight court hearings, including Gov. Jim Gilmore's own suit against me and his appeal to the Virginia Superior Court. The appeal was turned down within hours of being received.

By unanimous opinion with all justices present, the state Supreme Court issued a decision in Hugh's favor. The state and John Finn's "proof" that Hugh was not in a permanent vegetative state and that these were not his wishes was so weak that both cases were considered frivolous and attorney fees and sanctions were awarded to me—a very rare ruling.

In fact, the court ruled that by "clear and convincing evidence" Hugh was in a permanent vegetative state and his wishes were to not be maintained by medical means if he were in such a condition. There was *no* evidence to suggest otherwise on either point.

Grieving family members, who wish to have their own theological or ideological views carried out, are not medical experts. Nurse Marie Saul's "evidence" was not credible because there were no witnesses; she admitted she was never before asked to prepare an affidavit; and her supervisors helped her prepare the report. After Nurse Saul's affidavit was deemed meaningless by the court, another state investigation was undertaken by three state-appointed neurologists. They also determined that Hugh was in a permanent vegetative state. This report was issued to the parties involved, including the governor, *before* he filed his midnight suit against me.

In all, six doctors, five of whom are considered experts in the field of brain injury, concurred that Hugh was in a permanent vegetative state. The truth is undeniable that Hugh *was* in a permanent vegetative state.



I agree that serious discussion needs to take place regarding end-of-life issues. Assisted suicide, in which medical assistance is *administered* to hasten death, is one of those areas. Fictionalizing facts in one individual case makes all your arguments suspect in other cases you cite.

If you disagree with current laws and are truly concerned about people resorting to euthanasia to end their suffering, then back up your beliefs with the medical services, social services, and financial help these families need, but conservatives are loath to provide.

MICHELE P. FINN
FISHERVILLE, KY

WESLEY J. SMITH RESPONDS: ***I never stated or implied that Michele Finn's decision to dehydrate her husband to death was not legal. To the contrary, I specifically wrote that her decision had the approval of both federal and state courts. Of course, if someone were to dehydrate a horse to death, they would be prosecuted for cruelty to animals. That it is deemed ethical and legal to do so to people because they are cognitively disabled, it seems to me, should give us all great pause. As to the issue of PVS: The medical literature reveals that the condition is notoriously misdiagnosed. In the "food and fluids" cases I have studied, I have noticed that care givers and family members who claim that a patient is responsive are often dismissed curtly as merely "seeing what they want to see." Moreover, that the judge refused to consider the testimony of Nurse Marie Saul that Hugh spoke to her, is not the same thing as saying it wasn't true. Even if he were in a permanently unconscious state, it is undisputed that he was not terminally ill. Like all of us, he only needed basic care— food, water, warmth, etc.—to go on living. He was denied food and water and like any of us so deprived, he died. One last point: I never mentioned euthanasia in my article.***

Lump of Cole

Eric Felten is correct when he states, "There's a big gap between 'Bull dog! Bull dog! Bow, wow, wow / Eli Yale!' and 'When love congeals / It soon reveals / The faint aroma of performing seals'" ("King Cole," Dec. 21). But that's because Lorenz Hart wrote the second set of lyrics, not Cole Porter.

JOHN BURLEIGH
NEW YORK, NY

ERIC FELTEN RESPONDS: ***It was just one of those things.***

School Choice Bigotry

Michael W. McConnell writes that "Supporters of the public school establishment today are not bigots"

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("School Choice in America," Dec. 21).

If only it were so. In reality, bigotry, or at least hostility toward religion, still very much animates the public policy debate over educational choice. But now, the anti-religious bigotry of the public-school establishment is not just directed at Catholics, but at Protestant and fundamentalist Christians as well.

ROBERT ROBB
PHOENIX, AZ

TOO GOOD TO CLINTON

I respectfully, but wholeheartedly, disagree with David Brooks's assessment of Bill Clinton ("Return of the Wonks," Dec. 14).

Brooks says of Al Gore: "He never steps outside himself to even become aware of his own shamelessness—which I believe Clinton is capable of doing."

If that were true about Bill Clinton, then he would have accepted full responsibility for his actions, issued one sincere apology, and Al Gore would now be president.

MARY ROLFERT
CINCINNATI, OH

IN DEFENSE OF JOHNSON

David Frum's reference to President Andrew Johnson's impeachment is both distracting and historically inaccurate ("Profiles in Complicity," Dec. 21).

President Johnson was impeached for violating the Tenure of Office Act, which forbade the president from removing, without Senate approval, any official whose nomination had been subject to Senate approval. This was a foray into the realm of curbing the power of the presidency that had grown substantially through the course of the war.

Edwin Stanton, the secretary of war and ally of the Radical Republicans, was subverting Johnson's attempt to follow President Lincoln's designs for the reconstruction of the South. The Radical Republicans wanted to punish the South, not reconstruct it. President Johnson's dismissal of Secretary Stanton brought on the impeachment proceedings.

The digression where Frum calls Andrew Johnson "America's most nakedly racist president" is not only irrelevant to his argument, but is an unsubstantiated opinion. Who of Johnson's contemporaries called him a racist? I have never encountered such a charge. I have yet to encounter an historical reference where Sen. Roth held back his vote in Johnson's favor until Johnson's plan for "white supremacy" in the South had been defeated. This excursion into historical "deconstruction" is unnecessary to Frum's otherwise fine argument.

MICHAEL SMITH
GAITHERSBURG, MD

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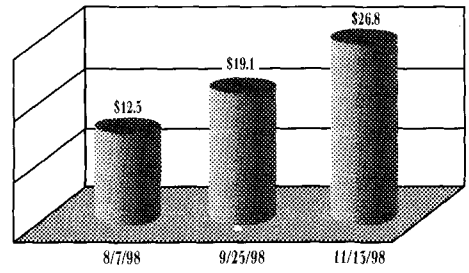

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the weekly Standard

AGAINST CENSURE

United States senators—following the lead of the 101st senator, the *New York Times* editorial page—are scrambling to fashion a "deal" for the "censure" of William Jefferson Clinton. The deal is proposed in the gravest possible tone of voice. Its advocates claim to be acting only with the noblest of aims: in practice, to "spare" the nation any further, drawn-out "agony" over the Lewinsky affair—and, in principle, to "protect the presidency" from any future, similarly "unwarranted" encroachment by the congressional impeachment power.

The "agony" business hardly merits comment. It is mere rhetorical bloat meant to give the plan an extra measure of urgency. Americans could hardly be less "agonized" by this year's scandal. *Anesthetized* would be a better word for it. And as the president's poll numbers climb higher and higher, there seems little chance that a Senate trial could do anything much more painful than wake the country up a bit. All to the good. We thank the "agonized" hand-wringers for their sympathy, but we politely decline to accept it.

And what of their suggestion that a congressional censure of the president—now, in lieu of a Senate impeachment trial, or *ever*—might somehow serve the institutional interests of the executive branch? This we cannot treat politely. Because the censure prescription that now grips the attention of our political establishment is not just a piece of insincerity. It is a piece of dangerous, anti-constitutional ignorance.

The Framers were not fools. Certain contingencies they were able to make provision for even without advice from the sages of Manhattan's West 43rd Street. Those risks to the presidency posed by unscrupulous or too-casual congressional impeachments did not go unconsidered at the Philadelphia convention. Neither were they left unaddressed by the Constitution.

Groundless impeachment convictions were made extremely unlikely by the two-thirds vote requirement imposed on the Senate. Unpopular impeachments were still more forcefully deterred—by the electoral system the Framers embraced. A House and Senate that removed some president against the nation's wishes would shortly face the wrath of voters, whose democratic vengeance would serve as an awesome threat against any such legislative "coup d'état."

But what if it weren't a "coup d'état" at all? What if a genuinely unworthy man occupied the presidency and nevertheless, through effective demagoguery, continued to enjoy the approval of his fellow citizens? This possibility—the one that seems least to concern today's censure-mongers—worried the Framers most of all. In fact, it was against the chance of such an emergency, more than anything else, that they designed the impeachment device in the first place. Justice Joseph Story's magisterial 1833 *Commentaries* on the Constitution explained the Framers' thinking:

Under those Confederation-era state constitutions that lacked an impeachment mechanism, Story observed, "the only redress" to executive abuses "lay in the elective power, followed up by prosecutions after the party had ceased to hold his office." And since "a momentary delusion might induce a majority of the people to reelect a corrupt chief magistrate," this remedy was "at once distant and uncertain." *Too* distant and *too* uncertain for the Framers. So their new federal Constitution adopted means for impeachment, which ever after held out "a deep and immediate responsibility, as a check upon arbitrary power," and compelled "the chief magistrate, as well as the humblest citizen, to bend to the majesty of the laws."

And what would compel the House and Senate, in the face of uncooperative Gallup Poll numbers, to make a miscreant president bend this way? Alexander Hamilton called it "republican principle." When "the interests of the people are at variance with their inclinations," he wrote in Federalist No. 71, then it becomes "the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion." In their Congress, Hamilton insisted, Americans deserve men and

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women with "the courage and magnanimity to serve them at the peril of their displeasure." On December 19, 1998, the House of Representatives bravely made good on Hamilton's challenge—by impeaching a hideously irresponsible though still-popular president.

But now, hardly a week later, the Senate stands poised to flee pell-mell its own obligations of republican principle. Public opinion appears unfriendly to what the House has done, and the Republicans are overawed. But public opinion also appears unwilling to see Clinton get off scot-free, and the Democrats are overawed. To square this impossible circle, both parties' Senate caucuses seem eager to lunge for the convenience of a censure resolution against Clinton—what they evidently view as an exquisitely calibrated, compromise alternative to impeachment.

Except that censure is not a legitimate alternative to impeachment. And the Constitution is not designed for the convenience of nervously careerist politicians. By censuring Clinton, Congress would retain the *power* of impeachment—"to doom to honour or to infamy," in Story's words, "the most confidential and the most distinguished characters of the community." (Even the mildest of the censures now being floated around Capitol Hill, remember, scores our president for having "egregiously failed" his constitutional oath, "violated" the public trust, and "dishonored" his office.) But censure would also, at the same time, abandon the constitutional *form and effect* of impeachment—and thereby subvert its purpose.

Impeachment is intended to keep the presidency clean of disgrace. If impeachment ends in acquittal by the Senate, then the president's good name is confirmed and he remains a worthy embodiment of the nation's highest office. If impeachment ends in conviction, then the offender is swept from view and the office is similarly preserved from taint. Censure, by contrast, formally identifies a dishonor to the office, but leaves the dishonorable man in place. It thereby announces, for all the world to hear, that the American presidency is nothing but another job, a fit workplace even for an infamous and *criminal* rogue.

Censure, in short, is a gob of spit attached to the presidency's reputation by a craven legislature. That such a proposal could now pass for *statesmanship* would be laughable, were it not so thoughtlessly damaging.

Bill Clinton, to be sure, would welcome the insult—and sooner rather than later, before the solemnity of a Senate trial kicks in, the better to delegitimize what the House has just done and thus get the Lewinsky troubles safely behind him. Words are just playthings to this president. The day after his impeachment, in a chance interview with the *Los Angeles Times*, he is caught *laughing* at that result: "Not bad," the "unexpectedly cheery" Clinton concludes. What is the verbal rebuke of simple censure to such a man? He is impervious to shame.

But is the rest of Washington impervious, as well? Is there no one else in town who has read *The Federalist*? Is there no one else who remembers how to love the government—particularly the presidency—its authors bequeathed us?

If the Senate fails to convict and remove Bill Clinton from the White House, as now appears likely, it will have made an awful mistake. But if it fails even to consider seriously the charges now lodged against Clinton by the House of Representatives, and short-circuits that constitutional process with a censure resolution, the Senate will be guilty of something worse than a mistake. Censure would be a travesty of the constitutional idea. It must not happen.

—David Tell, for the Editors

Clinton's Cockiness

by Fred Barnes

The day after he was impeached, President Clinton gathered with several hundred friends at the White House for a Christmas party. He acted like a man who'd just received an honor, not a rebuke. He joked about Larry Flynt, the porn publisher bent on exposing Republicans as philanderers. And he noted that attacks on an opponent's personal failings are a common tactic in politics. To punctuate the point, he recounted the famous story of President Lincoln's response to complaints that Gen. Ulysses Grant had a drinking problem. "Whatever he's drinking, make sure the other generals get some, too," Clinton quoted Lincoln as saying.

Think about that anecdote for a moment and you'll understand why the president himself is the biggest impediment to his short-circuiting a trial in the Senate and escaping with censure. What is he suggesting in the Lincoln story? Okay, he's being a bit lighthearted and jocular. Ha, ha, ha. Still, the message is that he's as successful a president as Grant was a Civil War general, so others should do what he's

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being condemned for—having sex with a young intern. Does any other interpretation make sense? I think not. By the way, we have Elizabeth Shogren of the *Los Angeles Times* to thank for reporting on the Clinton party, which she attended as a guest.

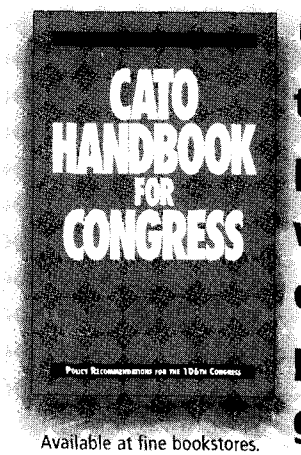
So here's the situation: As crisis engulfs his presidency, Clinton thinks he's doing fine. He's only the second president in American history to be impeached by the House, he may be ousted by the Senate, the public seems indifferent to his fate, and he still faces possible criminal prosecution. But Clinton thinks he's on a roll. And he isn't just whistling past the graveyard. Having forgiven his critics, he really believes he's more sinned against than sinning. "I have accepted responsibility for what I did wrong *in my personal life*," he declared at a White House pep rally on December 19, a few hours after he was impeached for perjury and obstruction of justice. "And I have invited members of Congress to work with us to find a reasonable, bipartisan, and proportionate response." In other words, mild censure.

AS CRISIS ENGULFS HIS PRESIDENCY, CLINTON THINKS HE'S DOING FINE. HE THINKS HE'S ON A ROLL, MORE SINNED AGAINST THAN SINNING.

Don't get your hopes up, Mr. President. There's a groundswell for censure in the Senate, but not for granting censure to a cocky, unrepentant defendant. Sen. Robert Byrd, Democrat of West Virginia, was furious at the president for piously lecturing the Senate. He told the president to butt out. Sen. John Breaux, Democrat of Louisiana, zinged the White House for considering a challenge in federal court to the impeachment counts. Other Democratic senators thought the pep rally on the South Lawn was a serious mistake, putting a defiant Clinton on display. Even some Clinton advisers think he's taken the wrong tack since the impeachment. "The White House should have learned the lesson that when it's up is the time to be the most magnanimous and reach out to your opponents," says Don Baer, the former communications director for Clinton and a current defender.

Notice the word "up." By this, Baer and indeed everyone else in Clinton's orbit means up in public opinion polls. For Clinton, poll numbers are holy and determinative. His presidential approval rating crept above 70 percent in some polls after his impeachment, and that told Clinton all he needed to know. This was also after 70 hours of bombing Saddam Hussein, but never mind. The White House interpreted the numbers as enthusiastic support for Clinton in the impeachment process. Press secretary Joe Lockhart insisted the polls "indicate that the American public has a full understanding of what the House did, that this was a partisan effort which had more to do with politics than it had to do with the Constitution, and that they did do a disservice to the House." Lockhart said the cover of *Time* with Clinton and Independent Counsel Ken Starr as men of the year was appropriate, "the leader of the Democratic party and the Republican party."

This is not the attitude senators are looking for. A censure that appears to let Clinton off easy won't wash, especially with Republicans and perhaps with



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as many as two dozen of the 45 Democrats. One conservative Republican senator called Gary Bauer of the Family Research Council to ask for his blessing if the senator opts for censure. Bauer didn't give it. Imagine how hard it will be for the senator to back censure if the president continues to act as if an "up" arrow is firmly attached next to his name. Then censure becomes O.J., Part II.

Even if Clinton cleans up his public act, he'll still be the chief impediment to censure. Every Clinton aide, adviser, and lawyer under the sun says the president won't admit he lied about his relations with Monica Lewinsky. Yet this is required by moderate Republican senators like John Chafee of Rhode Island as part of a censure deal. "He believes he didn't lie," a Clinton adviser told me. The trouble is nobody else believes that, least of all members of the Senate.

Fred Barnes is executive editor of THE WEEKLY STANDARD.

THE HIGH CRIME OF PERJURY

by David Lowenthal

IN THE END, THE CENTRAL QUESTION in the House debate over the impeachment of President Clinton was whether perjury or lying under oath is an impeachable offense. There are two ways of approaching this matter. One is historical: What did the Founders mean when they wrote in the Constitution that a president could be impeached for "treason, bribery, or other high crimes and misdemeanors"? And what does our constitutional tradition indicate? The second approach is to analyze the importance of perjury to our political system. The House Democrats—following the lead of some 400 historians who publicly declared their opposition to impeachment—depended primarily on the first of these, returning, as they think, to the words of the constitutional convention. The Republicans relied primarily on the second approach, applying political common sense to the problem of perjury.

IT CAN BE DEMONSTRATED, BEYOND A SHADOW OF A DOUBT, THAT PERJURY IS EXACTLY THE SAME SORT OF THING AS BRIBERY—OR EVEN WORSE.

The historical argument is far from confirming the Democrats' exclusion of perjury as an impeachable offense. Hamilton in Federalist No. 65 identified impeachable offenses as those "which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust." Perjury by the chief executive certainly falls within Hamilton's ambit. Nor is it possible to deny the strength of the Republican argument about the fundamental importance of truth-telling to our judicial system. Instead, the Democrats evaded the point by insisting that perjury is not included in what the Founders meant by "high crimes and misdemeanors" because, unlike treason and bribery, it is not a direct attack on the state. Perjury, the Democrats said, just doesn't measure up.

In so arguing, the Democrats implicitly admitted that if one could prove perjury to be of equal gravity with either treason or bribery, perjury would be an impeachable offense. Indeed, several Republicans on the Judiciary Committee asserted just such a connection: They called perjury the twin brother of bribery, noting that the federal penalties for perjury exceed those for bribery. But they might have gone further, for it *can* be demonstrated, beyond a shadow of a doubt, that perjury is exactly the same sort of thing as bribery—or even worse.

Of the two grounds for impeachment specified in the Constitution, the first—treason—is defined elsewhere in the document (Article III, sect. 3) and needs no further explanation. It is obviously the greatest danger to the state and the whole society. But the second—bribery—does require explanation. First, it does not seem to be on the same level as treason, which suggests that high crimes and misdemeanors vary in their rank or importance. Also, bribes can be either given or taken, and since neither type is specified in the Constitution, both must be considered impeachable. Nor is the amount or manner of the bribery stipulated: Evidently, that is left to the judgment of the House and Senate.

What is it that is dangerous about bribery? When a public official takes a bribe, he agrees not to perform his duties honestly and properly. That is the reason for bribing him: to keep him from doing something he might otherwise do, or to get him to do something he might otherwise not do. Imagine, for a moment, that

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the president had tried to bribe Judge Susan Webber Wright, or a member of the grand jury, or a member of Congress. He would have done so in order to get the person or persons bribed to act in his favor, regardless of the evidence. If he had done this, all would agree on his deserving impeachment. The president would have no defense.

Now assume, instead, that he had committed perjury in each of these three settings. His perjury in the civil suit against him would have been designed, like bribery, to thwart that suit. His perjury before the grand jury would have been an effort, like bribery, to thwart the grand jury investigation. His perjury before Congress would have aimed at thwarting Congress's investigation. In all three cases, perjury functions in exactly the same way as bribery. In fact, perjury is worse than bribery: To preserve secrecy, bribes are usually given to only a small number of people, whereas perjury, or lying under oath, is an effort to deceive many people—in this instance, judges, juries, and the American people themselves. Perjury is bribery consummate, using false words instead of money or other things of value to pervert the course of justice.

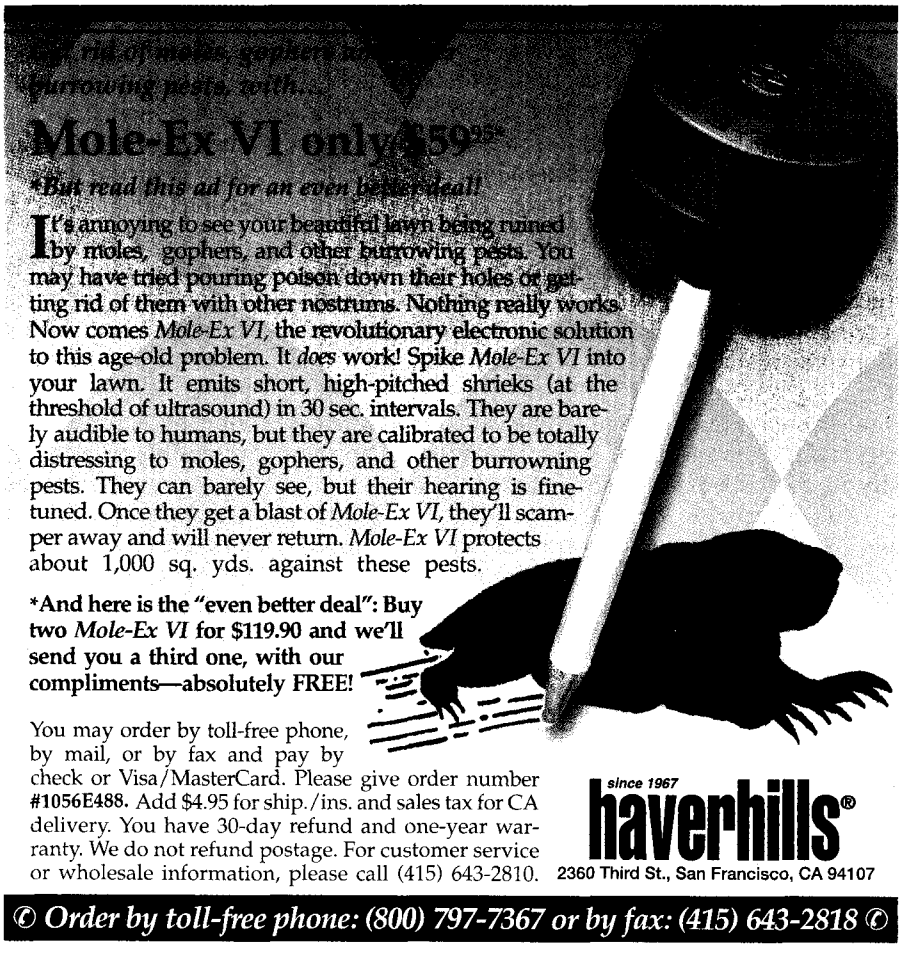
The conclusion is inescapable that perjury is as much a high crime or misdemeanor as bribery. No doubt instances of perjury, as of bribery, can range from the petty to the grand, but clearly, for the president, the chief executive officer, to lie under oath in a civil-rights suit against himself before a federal judge, thwarting a court-ordered deposition for the plaintiff, must be impeachable—exactly as an attempt to bribe the judge would be. Add perjury before both the grand jury and Congress, and the case becomes ironclad. If bribery is impeachable, perjury is even more so.

By singling out for mention the two quite different crimes of treason and bribery, the Founders invited us to think about them and the dangers they pose as we determine the meaning of "high crimes and misdemeanors." This reflection is essential. The House Republicans, having reflected, were unwilling to make exceptions or bend words for the sake of the chief executive.

Henceforth let no one call their effort "partisan" or charge them, as Democrats did, with attempting a "coup d'état." Knowing full well that accepting their constitutional responsibilities might injure them politically, they chose the right path and stood firm under rancorous attack. They refused either to bend or to respond in kind, thus preserving the memory and prospect of civility even when it was not being accorded to them.

Americans must hope that the Democrats in the Senate will think carefully about impeachment and that the Senate as a whole, Democrats and Republicans alike, will not fritter away the hard-won accomplishments of the House Republicans. For it will still be a partial victory for an unrighteous and dangerous cause if the Senate fails to convict a president who lied under oath.

David Lowenthal, professor emeritus of political science at Boston College, is the author of **No Liberty for License: The Forgotten Logic of the First Amendment.**



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SADDAM WINS—AGAIN

by Robert Kagan

LAST WEEK, PENTAGON OFFICIALS provided damage assessments of the four-day missile strike against Iraq. But they focused their attention on the wrong country. The most significant damage was not to be found in Iraq, where nearly half a billion dollars worth of U.S. missiles destroyed a handful of empty Republican Guard barracks and may have damaged some missile production facilities. These will be rebuilt in a matter of months. What will not be repaired, however, is the damage the otherwise ineffective missile strikes inflicted on the house of cards that is the Clinton administration's Iraq policy.

That policy, based on the preservation of sanctions against Iraq and on the intrusive inspections regime of UNSCOM, was, to use the Pentagon's lingo, "heavily damaged." The U.N. weapons inspections regime, as we have known it, is finished. France and Russia have demanded the resignation of UNSCOM chief Richard Butler, who, like Scott Ritter, has been declared *persona non grata* because he takes his job too seriously.

Remember last February, when the Clinton administration insisted that U.N. secretary general Kofi Annan's deal with Saddam would not undermine Butler and his team? Well now you can forget about it. Annan is working behind the scenes to create a new inspections regime that one of his advisers has dubbed "UNSCOM Lite." No more Butler. No more "intrusive" monitoring. No more challenge inspections. In Annan's plan, the task of keeping an eye on Saddam's nuclear weapons program would be handed off to the International Atomic Energy Agency, which managed to give Saddam a clean bill of health *before* the Gulf War. Iraq's chemical and biological weapons programs would be monitored by something called the Organization for Prevention of Chemical Warfare at the Hague, no doubt a most stalwart bunch.

And Annan's is the *compromise* plan. The French and Russians, with the support of China, are prepared to do away with UNSCOM and immediately lift all sanctions. French foreign minister Hubert Vedrine said last week that "it's time to move on to a mechanism more geared to the risk of future danger, rather than a systematic examination of what has happened in the past." That's a diplomatic way of saying that the international community should let Saddam build whatever weapons he's going to build and hope that he never uses them. Meanwhile, Vedrine said, it's time to "reconsider the question of lifting the embargo."

This is what last week's missile strikes accomplished. A year ago, the Clinton administration was trying to build a consensus in the U.N. Security Council to tighten restrictions on Saddam's regime and to make the U.N. inspections regime more effective. Now Clinton officials are going to have to fight a lonely diplomatic battle just to keep sanctions in place and to preserve a pale remnant of the inspections regime. And they will lose. Last week, administration officials were talking tough, promising to veto any proposal that "waters down" UNSCOM or lifts the sanctions. But in time they will buckle. What are the odds that the Clinton administration, with its visceral commitment to multilateralism and international consensus, is going to sit week after week at the Security Council, with its thumb down, isolated and embarrassed? The chances are they will cut a deal, accept some form of "UNSCOM Lite," and pray that Saddam doesn't blow anyone up before the end of Clinton's term in office.

The Clinton administration would not be under so much pressure to bend to the international campaign for appeasement if it actually had a plan of its own. Indeed, if it did, the international community, even the French, might be willing to listen. But the bombing proved, if further proof were needed, that the administration has no strategy either for "containing" Saddam or removing him.

The administration's muddle was on full display as senior civilian and military officials tried to explain exactly what they had hoped to accomplish with four days of cruise missile strikes and some limited aerial bombardment. Secretary of Defense William Cohen spoke of "degrading" Saddam's ability to launch a conventional military attack on his neighbors. This very limited mission at least had the virtue of being easily accomplished: The destruction of even one tank or airplane would have allowed the administration to declare success. But to what end? Another Iraqi invasion of Kuwait was not imminent. And since the ostensible trigger for the attack was Saddam's refusal to give up his quest for chemical and biological weapons, targeting his limited conventional capabilities would seem rather beside the point.

On the question of what it proposed to do about Saddam's chemical and biological weapons, the administration's answer was a cacophony of contradictions. When the strikes began Secretary Cohen declared that the "objective of the attack is to go after those chemical, biological or weapons of mass destruction sites to the extent that we can." This proved to be an artful and misleading claim. When the strikes ended, we learned that military planners had decided not to target weapons-production facilities after all because they were concerned about exposing innocent civilians to chemical and biological agents. According

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to senior Pentagon officials, they also avoided targeting facilities, like pharmaceutical plants, that might have civilian as well as military uses. But these decisions raise some questions. Why, for instance, was it legitimate to target a dual-use pharmaceutical plant in Sudan last August but not legitimate to hit similar facilities in Iraq? And if it really is the administration's policy to avoid hitting production facilities in Iraq, what does that say about any future effort to "contain" Saddam's weapons programs?

Over the past year, before every threatened use of military strikes against Iraq, the Pentagon claimed that one of the goals would be to hit those sites where Iraq was producing weapons of mass destruction. This was always a dubious proposition, given our limited knowledge of precisely where those sites are, but at least in theory it was a strategy aimed at the heart of the problem. Even after last week's bombing, administration officials suggested that the United States could contain Saddam by launching missile strikes whenever U.S. intelligence detects a renewal of his weapons programs. But what good will more strikes do if the administration persists in declaring the weapons-production sites themselves untouchable?

Stranger still were the broad hints offered by civilian and military officials that the hidden purpose of the strikes was to spark an Iraqi uprising against Saddam. While Secretary Cohen repeatedly declared when the bombing began that it was "not our objective to remove Saddam from power," after the strikes ended, the commander of the operation, Gen. Anthony Zinni, said he hoped the strikes had "contributed" to destabilizing Saddam's regime. He lamely pointed to the fact that while the Republican Guard were not actually in their barracks during the bombing, they would now be without a roof over their heads and had "lost the ability to command and control." Such musings were especially ironic coming from Gen. Zinni. At the end of October, Zinni had declared that any effort to topple Saddam would be foolish and dangerous, since it would fracture Iraq, create an "Afghanistan-like" condition of warring factions, and destabilize the entire region. What changed Zinni's mind? Cynics might suggest that it was his need to find a purpose for a mission that had no purpose.

Finally, there was the explanation offered by national security adviser Sandy Berger. "For me," Berger said, "the most important reason for why we had to do this was that to have failed to do so not only would have lost UNSCOM but would have lost the credible threat of force." Since UNSCOM is as good as lost anyway, Berger's point boils down to this: The administration had to use force so that it could maintain the "credible threat of force." In light of the administration's earlier bluffs, which Saddam repeatedly called, this credibility problem is no doubt a serious one. But how credible is the "threat" of force if the actual use of force has no discernible impact on the adversary, and serves no purpose?

The Clinton administration is, in short, bereft of a policy toward Iraq, indeed more so today than before the missile strikes. It refuses to consider serious action to remove Saddam by supporting the Iraqi opposition. It won't even contemplate the idea of sending in U.S. ground forces to do the job. Clinton's national security team utters vague promises about containment, about keeping Saddam "in his box," but they cannot begin to explain how they intend to accomplish this. Guess who's in the box now.

Robert Kagan is a contributing editor to THE WEEKLY STANDARD.

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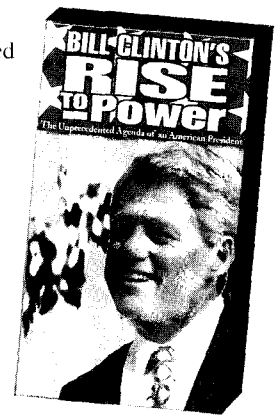

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TRIAL OF THE CENTURY...

Chief Justice William H. Rehnquist, Presiding

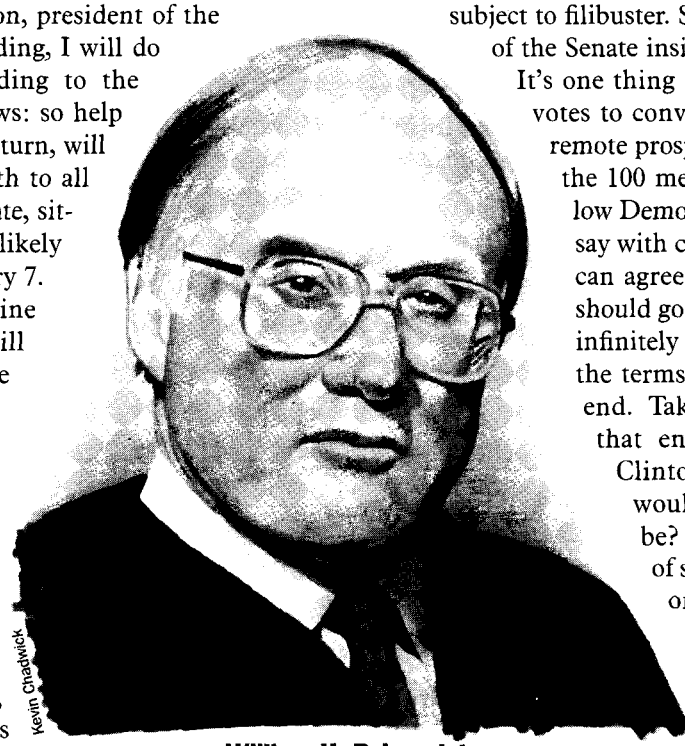
By Tod Lindberg

It will begin like this: The presiding officer of the U.S. Senate will ask the man before him in the Senate chamber, William H. Rehnquist, the chief justice of the United States, to raise his right hand and take this oath: "I solemnly swear that in all things appertaining to the trial of the impeachment of William Jefferson Clinton, president of the United States, now pending, I will do impartial justice according to the Constitution and the laws: so help me God." Rehnquist, in turn, will administer the same oath to all the members of the Senate, sitting as a jury. This will likely occur on or about January 7. And the trial to determine whether Bill Clinton will be removed from office will get underway.

If such a trial comes to pass, inevitably, it's going to have a certain majesty—in fact, a majesty out of all proportion to the tawdry conduct about which Clinton lied and obstructed justice, according to the articles of impeachment passed by the House. The Senate is well-practiced in trying to fake solemnity, albeit with mixed success. With the chief justice presiding over the Senate trial of an impeached president for only the second time in history, however, the solemnity is going to be genuine.

Will the trial of William Jefferson Clinton really go forward? Surely, the White House wants no such thing, and some of the senators and elder statesmen of both parties are bidding for their place in history as the brokers of some kind of censure deal. But this impeachment business, as we have all had occasion to observe, has a certain glacial momentum of its own. It may not be unstoppable, but it isn't easy to stop.

An attempt to derail the trial altogether would require a resolution that, under Senate rules, would be subject to filibuster. So if as few as 41 members of the Senate insist that a trial start, it will. It's one thing to note that achieving 67 votes to convict the president seems a remote prospect, especially since 45 of the 100 members of the jury are fellow Democrats. It's another thing to say with confidence that 60 senators can agree not only that the matter should go no farther, but also on the infinitely more complicated issue of the terms on which it comes to an end. Take censure. What would that entail? How much would Clinton admit? How contrite would he have to pretend to be? Would there be a penalty of some sort? Are there terms on which 15 Republicans would join 45 Democrats, plus the president, to overcome a filibuster mounted by any one Republican who objects. Can it even be assumed that the Democratic party would be united? West Virginia's Robert Byrd has been ominously inconclusive about the matter.



Kevin Chadwick

William H. Rehnquist

The White House is confident that this whole thing will be over in a month; in turn, this confidence, which some might interpret as cockiness and an unwillingness to recognize how serious Clinton's problem is, could make it harder to settle the matter. Once under way, the trial can end with a resolution passed by a simple majority. In that sense, it is easier to stop once it has started. But are 51 senators going to be so quick to risk the charge that they are indifferent to evidence in something so grave and constitutional-

Tod Lindberg, a frequent contributor, is a columnist for the Washington Times, where he was editorial page editor for seven years. In January, he becomes editor of Policy Review.

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ly large as an impeachment trial? Once such an awesome thing is set in motion, it may well develop a life of its own along the lines that propelled the House to a vote on impeachment articles. Trials are, by their nature, inherently unpredictable, impeachment trials all the more so for their rarity and constitutionally unique character. Who knows what might happen?

A few things are clear, however. When it's the president in the dock, it's the chief justice who serves as magistrate. Rehnquist will rule on the constitutional issues, the law, the rules of evidence—everything. And he will be the one who maintains order in the Senate chamber as the case goes forward. Presumably, he will be guided by the Supreme Court's past decisions, federal rules of criminal procedure, and precedent in impeachment cases. But there is nothing that requires him to be so guided. And his judgment is not subject to the review of any higher court.

But in a procedure unique to impeachment, his judgment is subject to the immediate review of the Senate—the very jurors in the trial. In an ordinary courtroom, the judge has extraordinarily broad authority, including the power to hold persons in contempt and sanction or even imprison them for the failure to abide by his instructions. At the Supreme Court, Rehnquist is famously intolerant of any insult to the decorum of the Court's proceedings. And no lawyer arguing a case before him would dare be anything but attentive to him, deferential and immediately compliant. It is simply the respect due the constitutional head of the judicial branch when he is presiding over the Supreme Court.

Strangely though, the chief justice of the United States will have less real power in this court of impeachment than a lowly trial judge has in district court. There is nothing final about Rehnquist's say here. The proceedings are apt to include numerous instances in which the jurors vote to uphold or overturn the judge. His rulings take effect only so long as a majority of the senators agree with him.

Consider this little sequence of events near the conclusion of the Andrew Johnson impeachment. After the House managers of the case against Johnson made their final arguments, applause broke out in the gallery.

> THE CHIEF JUSTICE. Order! Order! If this be repeated the Sergeant-at-Arms will clear the galleries.
>
> This announcement was received by laughter and hisses by some persons in the galleries, while others continued the cheering and clapping of hands.
>
> MR. GRIMES. Mr. Chief Justice, I move that the order of the court to clear the galleries be immediately enforced.
>
> The motion was agreed to.
>
> THE CHIEF JUSTICE. The Sergeant-at-Arms will clear the galleries.
>
> [Hisses and cheers and clapping of hands in parts of the galleries.] If the offense be repeated the Sergeant-at-Arms will arrest the offenders.
>
> MR. TRUMBULL. I move that the Sergeant-at-Arms be directed to arrest the persons making the disturbance, if he can find them, as well as clear the galleries.
>
> THE CHIEF JUSTICE. The Chief Justice has already given directions to that effect.

Actually, maintaining order in the court is the least of the issues here. The White House, for example, is said to be considering a constitutional challenge to the House impeachment articles. It would argue that an impeachment cannot carry over from one Congress to the next, or else the Twentieth Amendment's provision moving the start of a new Congress from March to January, thus doing away with routine lame-duck sessions, has no meaning. The president can try to litigate this claim if he wants to. Getting the matter resolved, presumably including appeals as far as the Supreme Court if only to resolve the question of whether an impeached president can raise such a claim in the courts, might delay the impeachment trial; the delay is something the president might or might not find politically useful, depending on the circumstances. But rather than going to court, the president's defenders may choose to raise the issue in the forum of the Senate impeachment trial, possibly in the form of a motion to Chief Justice Rehnquist at the outset to end the proceedings on grounds that the carry-over was unconstitutional. Rehnquist would duly rule—but the real power to make the decision would lie with the Senate, which would either accept or reject his decision by majority vote.

Impeachment is thus a realm where the Senate itself may be called upon to decide what is constitutional and what is not in any number of areas. They will have the benefit of Rehnquist's thinking. But the majority will rule. Really, how could it be otherwise? In impeachment trials, the Senate's say is final. There is even the rather interesting theoretical possibility that the Senate will consider a matter the Supreme Court has already ruled on and reach an opposite conclusion. The House, in the end, did not vote out an article charging perjury in the Paula Jones case; but if it had, the president's lawyers might have had the opportunity to revisit the Supreme Court ruling rejecting the claim that the president is immune to civil suit while in office. Fifty-one senators would be free to reach the conclusion that the Court had it wrong. There is also potential for conflict at a sub-

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constitutional level. Suppose the chief justice rules that certain testimony shouldn't be heard on grounds of hearsay. If a majority of the Senate decides it wants to have the testimony, the usual judicial rules on hearsay simply won't apply.

This might sound like a recipe for disaster and delay—the proceedings forever galloping off, Judge Ito-like, on one tangent after another—but that almost surely overstates the case. If there's one thing people who know Rehnquist find laughable, it's the notion that this will inevitably be a lengthy and meandering proceeding. He is famous for moving things along, not least in the contentious environment of the Supreme Court where he manages the work of nine people with seriously divergent viewpoints and guaranteed lifetime tenure who happen to have the last word on what the law of the land is. The conferences he holds with fellow Supreme Court justices are said to be exemplary in their efficiency. Even the late Justices Thurgood Marshall and William Brennan praised the ability of the conservative Rehnquist to manage the court.

Rehnquist's public persona is humorless and unforgiving. He has a reputation for suffering fools badly, especially those making legal arguments he considers flawed. At the Supreme Court he has been known to interrupt oral arguments—in a tone comprising of astonishment and contempt—to ask an offending lawyer if it is really possible that he is making such a ridiculous point. Rehnquist is no politician. He has no detectable glad-handing skill or sensibility, and the notion that he would play to a camera is ridiculous to those who know him. In fact, there is widespread agreement that cameras will televise Supreme Court public proceedings only after he is long gone.

In short, there is a certain imperious authority that comes of being only the 16th chief justice of the United States. He will surely exert it at an impeachment trial. It is by no means a simple thing to ride herd on one hundred egos as large as those of U.S. senators. But it seems improbable that anything like an organized rebellion against his authority will arise. And while his manner may not seem cuddly to the television audience at home or sufficiently unctuous to senators used to a certain highfalutin deference, his mastery of the law is surely greater than that of anyone in the Senate, and the senators are likely to respect that.

Rehnquist has been preparing for this moment for a long time. Exhibit A in support of this proposition is his 1992 book, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, a popular history of what the chief justice clearly regards as the two most important impeachment proceedings in U.S. history—at least to date.

Grand Inquests was respectfully and favorably reviewed in the popular press and the legal press when it appeared six years ago. The identity of its author was of course a key reason; when the chief justice speaks, lawyers listen, especially if they belong to the fraternity with business before the Supreme Court. Also, there was the novelty of at least the theoretical possibility that the author would one day preside, as the Constitution warrants, over the impeachment trial of a U.S. president. But Rehnquist's recounting of how Justice Chase ran afoul of the House of Representatives in 1804-05 over the Alien and Sedition Act and of President Johnson's troubles over the 1867 Tenure of Office Act rang no particular bells with the reading public. Now, however, who would deny that Rehnquist's views on impeachment have become an urgent concern.

Rehnquist regards the two impeachments he writes about here as important for what they did not do. The Senate acquitted both Samuel Chase and Andrew Johnson. Rehnquist is at pains to establish that had either been convicted, it would have been a dangerous precedent. In the case of Justice Chase, the Senate declined to remove a judge with whom most senators disagreed politically. The result was an affirmation of the independence of the judiciary. Conviction and removal would have amounted to an assault on the ability of judges to reach their courtroom conclusions independently. President Johnson had enraged congressional majorities with his reluctance to accept Congress's views on post-Civil War Reconstruction of the national government. Had the Senate removed him, the country might have taken a long step away from a presidential system toward a parliamentary system, in which all it takes is a parliamentary vote of no confidence (a two-thirds vote, to be sure), for political reasons or over a policy disagreement, to topple the head of state and chief of government.

It will be tempting to infer from his conclusions in *Grand Inquests* that the chief justice is skeptical about impeachments in general—including this one. A careful reading of the book shows a more nuanced view. The impeachment of Samuel Chase also had the effect of imparting a certain humility and discretion to the conduct of judges, both inside and outside the courtroom. The idea that federal judges should step out to offer their views on political matters has been alien ever since. And President Johnson himself did accom-

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modate the concerns of the House majority on the principal point of contention between them. In general, he diminished his opposition to the House members' view of how Reconstruction should proceed.

The larger, historical, point, however, is clear. In Rehnquist's words, the Chase and Johnson acquittals confirmed that

> Impeachment would not be a referendum on the public official's performance in office; instead, it would be a judicial type of inquiry in which specific charges were made by the House of Representatives, evidence was received by the Senate, and the senators would decide whether or not the charges were proven. The Johnson acquittal added another requirement. . . . It was not any technical violation of the law that would suffice, but it was the sort of violation of the law that would in itself justify removal from office.

The Rehnquist book also establishes, not by design but just as a matter of course, that for 200 years the quarrel over impeachment has been between those who would impeach only for crimes and those who would impeach for things that might broadly be construed as political disputes. The quarrel has not been over whether felonious conduct is impeachable. The notion that it isn't would seem to be a modern invention.

Grand Inquests is also interesting for the dog that isn't barking, especially in the account of the Johnson impeachment. Rehnquist has very little to say about the actions, reasoning, and rulings of Chief Justice Chase. He confines his discussion of Chase to the observation that Chase's own ambition for the presidency, in this highly charged and partisan climate, may have fed the unproven charges that Chase wanted acquittal and worked corruptly behind the scenes to achieve it. Rehnquist seems offended at the notion that serving as chief justice of the United States is somehow an insufficient accomplishment in life.

Surely Rehnquist has views on his predecessor's conduct of the Johnson impeachment trial. But he has kept whatever he learned from his research to himself—perhaps in reserve for the day when he might be called upon to preside over an impeachment trial.

That day is fast approaching. And Rehnquist's few words about Chief Justice Chase may offer a cautionary note. This, too, will be a highly charged and partisan environment, if not in the Senate chamber, then surely among those second-guessing on the outside. The president's greatest ally is still public opinion. The White House has yet to make up its mind about the legitimacy of this process. As to what the White House and its friends might say about the chief justice if the rulings in an impeachment trial go against the president—Rehnquist, after all, is a Republican—well, it might just take the seriousness, if not indeed the imperiousness, of a Rehnquist to stand up to it.

Still to come, as Rehnquist knows well, is the judgment of history—and by history's reckoning, it's not just the president on trial. It's also the House, the Senate, the chief justice, and even the nation. ♦

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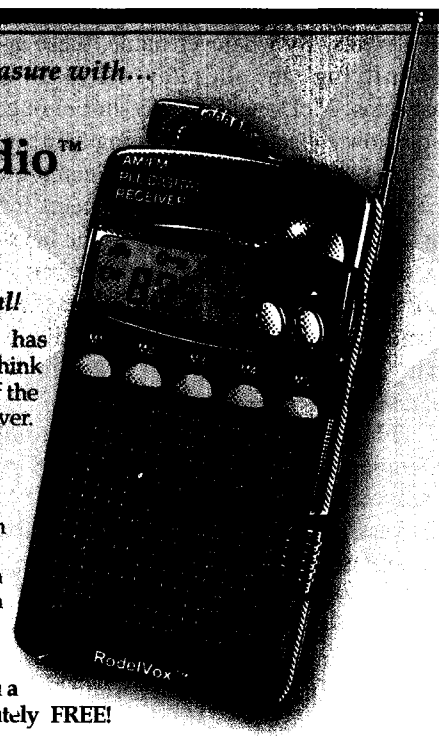

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Dirty Deals in Smoke-Free Rooms

By Christopher Caldwell

There's an old Russian joke about how the second-worst thing that ever happened to the country was the rise of Lenin—the worst thing, naturally, being the death of Lenin. Americans interested in tobacco legislation may be living a version of that joke. If the second-worst turn of events in the politics of tobacco was the drafting of last summer's $600 billion federal tobacco bill, the worst may have been its killing. The $208 billion agreement signed by 46 state attorneys general and the Big Four tobacco companies in November may be worse than the deal it replaced.

The agreement itself is less harmful than the apparently limitless opportunities it opens up for plaintiff's attorneys. Almost all of the states hired plaintiff's attorneys, also known as tort lawyers or trial lawyers. By whatever name, these are specialists in identifying an allegedly harmful agent—dioxin, asbestos, McDonald's coffee hot enough to burn you, and now tobacco—and finding someone to blame for it. In most cases, this means a company large enough to pay a gargantuan court judgment if found liable or at least to pay millions to keep the lawsuit out of court in the first place. Depending on whom you talk to, tort lawyers are either (a) justly rewarded Protectors of America's Children and Unfortunates or (b) bullies who pervert the spirit of the law to operate a legally sanctioned shakedown racket.

They are also among the most prolific givers to the Democratic party, which receives 91 percent of their campaign contributions. Between 1989 and 1994, trial lawyers pumped $30.9 million into federal elections, an amount that surpassed the donations of the country's five biggest labor unions. After multimillionaire tort lawyer John Edwards's resounding victory over Republican senator Lauch Faircloth of North Carolina in November 1998, Republicans shudder to imagine what trial lawyers could do with billions of dollars to tithe into politics.

In the 46-state tobacco agreement, the trial lawyers who arranged the deal worked, as is their custom, not on salary but for "contingency fees" that would pay them up to one third of the damages—but only if they won. Which they did. Under the rules of the agreement, the lawyers' fees are to be paid by the tobacco companies—not by the lawyers' ostensible clients, the states. This insulates the lawyers (up to a point) from inevitable claims that they are taking money that would otherwise go to overburdened public-health agencies. The lawyers also worked to get many of the most controversial issues resolved by arbitration, leaving them less subject to outside review. About the only concession the companies got was a $500 million cap on annual disbursements to plaintiff's lawyers. Both parties assumed this was a means of stretching payments out over the next decade or so. Nobody anticipated that the lawyers' fees would reach such a level that the question would arise whether they could be paid off within the next *century*.

The reason the agreement included only 46 states is that four states had already settled separate suits against the tobacco companies. In May, Minnesota became the first of these four to address the question of legal fees, and it did so under conditions extremely favorable to the tort lawyers. Attorney general "Skip" Humphrey had inked a 25 percent contingency-fee agreement with one local firm—Robins Kaplan, Miller & Ciresi—and had vowed to fight for every penny. Minnesota's suit was settled for $6.5 billion.

In the event, lead counsel Michael Ciresi refused to submit his fees to arbitration, and it was easy to see why. Legal fees are often subject to arbitration proceedings that demand fees be "reasonable." Reasonableness is determined first by setting a "lodestar," a basic payment reflecting the award and billable hours; then a "multiplier" is determined that adjusts the fee for such intangibles as effort and risk. The $440 million Ciresi was awarded over two years was 7 percent of the total Minnesota settlement, but it still looked like a very good deal given the relatively low number of billable hours. It was, six months ago, the highest contingency fee in American history. But now it looks like Ciresi made at best a third of what he could have.

What no one had quite absorbed was that fee arbitration was in this case a rigged game. The settlement

Christopher Caldwell is senior writer at THE WEEKLY STANDARD.

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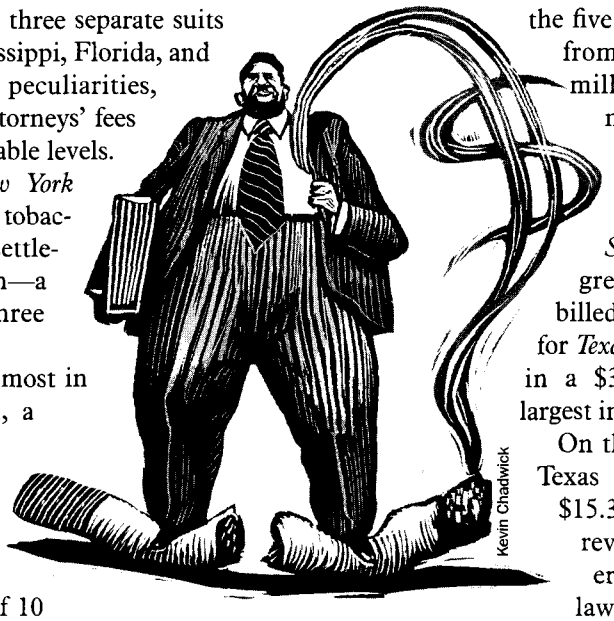
stipulated that each panel would consist of one arbitrator chosen by the tobacco industry, one by anti-tobacco lawyers, and one by the states bringing the suit in the first place. This meant that the tobacco companies were outnumbered two to one. What's more, an appendix to the agreement included an extraordinary gag rule regarding lawyers' fees: "Settling Defendants will not take any position adverse to the size of the award requested by Private Counsel nor will they express any opinion (even upon request) as to the appropriateness or inappropriateness of any proposed amount."

Last week, the remaining three separate suits were arbitrated in Mississippi, Florida, and Texas. While each has its peculiarities, together they tell us that attorneys' fees will reach hitherto-unthinkable levels. Mere weeks ago, the *New York Times* estimated that fees to tobacco lawyers in the 46-state settlement could total $8 billion—a mark surpassed by these three states alone.


Kevin Chadwick

Florida lawyers got the most in dollar terms—$3.4 billion, a quarter of the damages. Mississippi lawyers got $1.4 billion, 35 percent of the state's take. This may be the upper extreme. Arbitrators set a lodestar of 10 percent; the high multiplier (3.5) came from state attorney general Michael Moore's having been the first to file suit. And while many lawyers vie for the dubious honor of having dreamed up the idea of suing tobacco companies in the name of (innocent) taxpayers, not (those goddamn) smokers, the strategy was first broached in a courtroom by Mississippi's lead attorney, Richard Scruggs. The legal theory behind the strategy has never been tested at trial, but one can already credit Scruggs as an innovator and a risk-taker. It will be interesting to watch him throw his muscle around in politics, as he intends to do. Because Scruggs is not just Michael Moore's best friend from law school; he's also Senate majority leader Trent Lott's brother-in-law. Since Moore is now in the running for next fall's Mississippi governor's election, it's noteworthy that Scruggs was the biggest contributor to Moore's attorney-general campaign in 1991. Lawyers involved in Moore's initial tobacco suit contributed $24,166 to his 1995 reelection campaign.

This pattern—of favored contributors' getting comfy spots on an attorney general's litigation team—was allegedly repeated in Texas, where five private attorneys were awarded $3.3 billion (or 19 percent) on a $17.3 billion settlement. Of the individual state settlements, Texas's has come in for the most scrutiny, largely thanks to Texans for Reasonable Legal Fees, a watchdog organization founded by a number of good-government and low-tax civic groups. In Texas, the big issue was "free-riding": Whereas in Minnesota and Mississippi the lawyers did significant original work, Texas's attorneys had to do little beyond signing up clients. Nor did they take any great financial risks: Even before the case came to arbitration, the five had already got $100 million from cigarette makers and $50 million from the state. What's more, they billed the state for $40 million in expenses, with only $1.7 million of it documented. (As the *Wall Street Journal* points out, the great tort lawyer Joe Jamail billed just $5 million total expenses for *Texaco* v. *Pennzoil*, which resulted in a $300 million fee award, the largest in pre-tobacco history.)

On the same day last January that Texas settled its tobacco case for $15.3 billion (the sum was later revised upwards), attorney general Dan Morales's private lawyers sought immediate approval of a 15 percent contingency fee. They also executed a contract getting Texas to waive all rights to revise the fee. Morales even guaranteed the state would make up the difference if the arbitrators didn't agree to it. In public, meanwhile, Morales said, "I think any discussion or speculation of fees in the multibillion-dollar amount range is laughable. I think that the court is going to do something appropriate, something responsible." In one of the strangest episodes, Texas lead attorney Walter Umphrey revised his request, asking for not 15 percent of the recovery but *145 percent*—$25 billion in fees. Umphrey justified his claim by citing a Yale professor's assessment that the inflation-adjusted value of the Texas part of the settlement over time is $106 billion.

If the first three states to go through arbitration are any benchmark, we can expect the lawyers' compensation in the $206 billion, 46-state case to range between the one-fifth of the settlement that the "free riders" from Texas received and the one-third granted the genuine risk-takers and innovators in Mississippi.

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That is, the lawyers are likely to reap, all told, between $40 and $65 billion. And a mere state-by-state look fails to reflect the extensive overlap in tobacco representation, and thus how narrowly the tobacco payoff will be concentrated in the hands of a very few lawyers. The South Carolina tobacco-litigation experts Ness Motley have a special deal that provides them a 10 percent consulting fee from the Texans' take. One Ness Motley lawyer, Joe Rice, represents at least 20 states, and Dick Scruggs has nearly as many. Both Scruggs and Rice, it's interesting to note, are lawyers for New York's tobacco agreement. Certainly evidence of changing times, when Manhattan is so empty of lawyers that the New York attorney general has to look to Mississippi and South Carolina to find litigators to represent the state on official business.

There's something offensive to common sense in legal arrangements that use the power of the state to generate private fees that could reach $100,000 per hour—even catapulting a handful of ambulance-chasers onto the Forbes 400 list of the richest men in America. Such arrangements offend legal tradition as well. Contingency fees, as legal scholar Walter Olson notes in *The Litigation Explosion*, are banned in other countries—banned because they inevitably cause corruption. In litigation-mad America, contigency fees used to be considered a necessary evil, but they were hedged with safeguards in order to ensure they were used only for indigent clients. Even after the original reasoning broke down, and contingency-fee lawyers began taking *wealthy* clients, there was a consensus that such arrangements were unethical in government suits. Massachusetts broke that custom in the asbestos suits of the 1980s, and in little more than a decade, tort lawyers have revolutionized the legal system.

There are obvious possibilities for collusion, bad law, and conflict of interest. In the case of tobacco, given that the fee caps will stretch the tobacco companies' payments over decades, the same powerful tort lawyers who took on the tobacco industry now have a long-term vested interest in keeping it highly profitable. Michael Horowitz, a legal analyst at the Hudson Institute, sees another source of conflict in the unusual arbitration arrangements: "What state or smokers' interests," he asks, "were sacrificed by the attorneys general to get the tobacco companies to agree to be bound by multibillion-dollar decisions of arbitrators chosen by parties with interests hostile to theirs?"

The corruption also takes on more explicit personal dimensions. Northeastern University professor Richard Daynard, chairman of the Tobacco Products Liability Project (who throughout the congressional negotiations last summer was quoted as an "impartial" scholar in hundreds of articles generally favorable to anti-tobacco forces), has retained a litigator of his own to demand 5 percent of all fees settled in states Scruggs is handling, claiming Scruggs promised him as much verbally. "The services I've been doing over the years," Daynard argued in the *Wall Street Journal* in October, "have redounded to the benefit of all the states' cases."

The big fallout from the tobacco debacle, though, will be in politics, for trial lawyers are among the most politicized people in the country. Michael Horowitz is now warning his fellow Republicans that the tort lawyers are active not just as donors but as candidates. The North Carolina Senate victory of John Edwards—net worth $60 million—is only the beginning of Republicans' troubles. "Next time out," Horowitz warns, "you could have five races where each guy is worth *$600 million*."

Horowitz was perhaps the lone advocate among conservatives of last summer's federal settlement, largely because of its treatment of the legal-fee issue: In the late stages of congressional debate, Washington senator Slade Gorton offered an amendment to limit attorneys' fees in the case to $4,000 an hour—eight times the hourly rate of Washington's best lawyers, and sixteen times what the tobacco lawyers arguing the opposite side were getting, but well below the casino rates of the latest deal. It passed narrowly, 49-48.

Is there a way to subject the 46-state agreement to similar ethical limits, given its multiple jurisdictions? Probably not, though there are some possibilities. If cigarette-price increases are seen as a de facto tax, then the argument can be made, state by state, that taxes can only be levied by the legislature. (But who would make that argument? The state attorneys general, who brought the case in the first place?) There are also state rulings on how one procures services and on competitive bidding. An agreement between attorneys general, tobacco moguls, and tort lawyers is unlikely to meet the most lenient of such standards. According to Walter Olson, such an arrangement looks suspiciously like the medieval practice of tax farming. "If this had been done with highway resurfacing instead of cigarette law," he says, "what do you think the Public Integrity section of the Justice Department would have to say about it?"

The Supreme Court is unlikely to take much interest. It is perennially loath to invoke constitutional "takings" doctrine. Even if the agreement could be shown to have been carried out only thanks to the oligopolistic shape of the cigarette market, don't expect a Sherman Act anti-trust case soon. Certain Republican

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congressmen, among them Bill Archer of Texas and Christopher Cox of California, are said to be receptive to the idea of an excess-profits tax, along the lines of the one imposed on oil companies during the era of price controls two decades ago.

But for now, it's a clear victory for the tort lawyers. This means a cash infusion for Democrats that could leave Republicans begging for the campaign-spending caps they gleefully scuttled just two months ago. How come no one's noticed? Says Olson, with less irony than you'd think: "These Democrats are lucky there's an impeachment on." ♦

STALIN'S AMERICAN VICTIMS

The Sad Saga of Finnish-American Communists in 1930s Russia

By Peter Day

In July 1997, CNN posted a poignant "photographic essay" on its Internet news site about the discovery in Russia of what it called a "horrific reminder of the nation's past." The network reported that a mass grave of more than 9,000 people had been excavated in a forest glade in Sandermakh, situated "amid the low hills and picturesque streams of Karelia, a republic in northwest Russia." The London *Times* also reported the find, describing it as "one of the most grisly discoveries of post-Communist Russia."

Members of the Russian historical society known as Memorial had located the site, some 245 miles north of St. Petersburg near the town of Medvezhyegorsk, after finding secret police archives of written execution orders for victims who were shot there during the height of the Terror of 1937-38.

At Sandermakh, Memorial's excavation teams found scores of trenches filled with jumbled skeletal remains and thousands of bullet casings. Each of the dead had been shot in the back of the head while kneeling at the edge of one of the trenches. CNN commented: "Memorial believes that the Karelian discovery sheds new light on Stalin's purges when an estimated 14 million Soviets died."

It turns out, however, that the discovery sheds light not only on Russia's past, but on an extraordinary story that for 60 years has been one of the darkest secrets in the history of the American Left.

Who were the victims of Sandermakh? CNN described them simply as "political prisoners." The *Times* observed that although it was "too early to know who the buried were, it is assumed most were intellectuals from Moscow and St. Petersburg." But the Memorial spokesmen also mentioned that among the victims were members of "ethnic minorities" and—most significantly—people who "had come to Karelia to build socialism."

The significance of these comments was made manifest a few months later when at the opening of a memorial chapel in the woods, wreaths were laid in the snow at the Sandermakh site. One of these wreaths, photographed by Veniamin Ioffe of Memorial's St. Petersburg office, bore a tiny American flag. Inquiries recently undertaken in Russia have now shown that among the Sandermakh victims were more than 200 North Americans.

Each of the North Americans whose remains lie at Sandermakh disappeared in Soviet Karelia during the 1930s, after being lured there in a Depression-era immigration scam that was run by Moscow through the U.S. and Canadian Communist parties. They targeted Finnish-Americans, in particular, Finnish-American forestry workers.

Those who were ultimately executed at Sandermakh were not the only ones to vanish: Finnish scholars estimate that of about 5,000 North Americans who traveled to Karelia in the early 1930s—including whole families—roughly 1,000 subsequently disappeared without a trace.

Most historians have neglected the episode. But luckily, the scholarly evidence for it has been well summarized in a book published early this year—before the authors became aware of the Sandermakh find—entitled *The Soviet World of American Communism*. The authors of this volume, historians Harvey Klehr and John Haynes and Russian archivist Kyrill Anderson, not only document the basic facts of the matter, they also charge that North American Communist leaders of the time, after encouraging Finnish-

Peter Day, former American correspondent for the Australian, *is a publisher in Sydney.*

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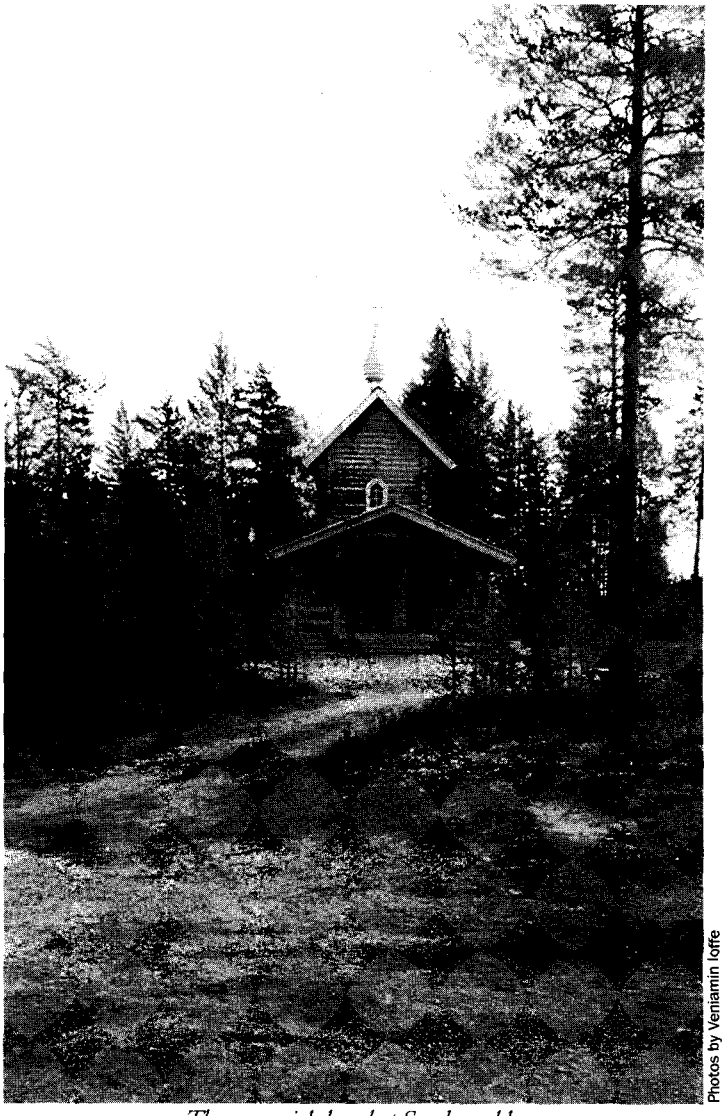
Americans to travel to Finnish-speaking Soviet Karelia, did nothing to help them when they were later arrested. Further, they produce documents showing that the North American Communist leaders, acting under instructions from Moscow, took "active measures" to suppress reports of the victims' fate.

Some American academics are unconvinced. Two months ago, a prominent Brown University historian, James Patterson, argued that the ultimate fate of the North Americans in Karelia was a matter of doubt. Reviewing *The Soviet World of American Communism* in the *Atlantic Monthly*, Patterson conceded that "many of these people were apparently executed," but noted that the "evidence for the killings . . . comes from accusations in subsequently written memoirs from family members and from survivors—not from the archives."

This defense is no longer possible. In recent months, lists of names of Sandermakh victims, from secret police records, have been published in a respected monthly cultural journal called *Karelia*, put out in the Russian city of Petrozavodsk. The lists give each person's year and place of birth, country of departure before arriving in the Soviet Union, year of arrival, and occupation. The lists show that people executed and buried at Sandermakh were categorized by the secret police as either Russians, Finns, or Karelians. But notations in the records show that 115 of the "Finns" came to Karelia from the United States and 106 from Canada.



Photos by Veniamin Ioffe

The memorial chapel at Sandermakh

Author Carl Ross, who will be including the victims' names in his forthcoming *The Finn Factor in American Labor, Culture and Society*, told me that he has long been "disturbed over the plight of the numerous people in the United States who knew nothing more than that members of their families, or acquaintances, 'disappeared' and were never heard of again." But he says that "the opening of mass graves in Karelia has definitively answered those questions—we know what happened and who was responsible."

Among the dead listed by *Karelia* are names well known to Finnish-American scholars like Ross. They include Matti Tenhunen and Oscar Corgan, prominent Finnish-American Communists who, after migrating to Karelia, were publicly denounced as "spies" by the Soviet authorities. Ross said his family often enjoyed Tenhunen's hospitality and that he also knew Corgan, "manager of the *Tyomies*," a Finnish-language paper for which Ross's father worked.

But most of the North American victims were "ordinary people." Nearly all arrived in the Soviet Union between 1931 and 1933, the period of most intense Soviet recruitment among the North American Finnish ethnic communities. Forestry workers from ages 20 through 40 dominate the execution list. But the list also includes housewives, musicians, teachers, publishers, actors, carpenters, blacksmiths, mechanics, plumbers, painters, and a journalist.

Most had originally migrated to the United States or Canada from Finland; of those born in North America, some were still teenagers when they traveled to Karelia with their families. The youngest, born in Minnesota, was 14 or 15 when she traveled to Karelia in 1932, and 20 or 21 when she was executed at Sandermakh. After her name—as with every other name on the list—are the single word "shot" and the date of execution. (Ross cautions against publishing names at

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The gravesite (top); a memorial erected by the Karelian government

this stage since spelling errors may have occurred in transcription.)

But for many Americans, questions will remain. Why has it taken so long for the discovery of the remains at Sandermakh to be reported? How is it that American historians of the period do not even acknowledge in their books that thousands of American workers were *in* the Soviet Union during the 1930s—let alone that many of them were executed?

Like everyone else, the media learn most of what they know of the past from historians, and it is the almost total neglect by historians of the thousands of people who migrated from North America to the Soviet Union during the 1930s that raises the most disturbing questions.

Consider the CNN *Cold War* series, advised by an impressive panel of historical consultants. The first episode of this series actually discusses the issue of Americans in Russia in the early 1930s—but without once mentioning the thousands of Finnish-Americans who were lured there at that time. The narrator recounts how, in the early 1930s, "American experts" and their families traveled to Russia to help with industrialization, commenting: "While Soviet muscles strained to raise dams and blast furnaces, American corporations supplied skilled engineers on contract. Communist ideology didn't worry them. Unlike the Russians, they were free to go when the job was over." But Sandermakh now confirms that many skilled American workers in the Soviet Union at that time, unmentioned by CNN, were not "free to go when the job was over."

While observing that few historians mention the Karelian episode, Harvey Klehr and his co-authors focus on the suppression that occurred within the Finnish-American community. They quote very effectively from the belated testimonies of survivors on how they were kept silent for decades. Thus a memoir written by one American couple, Lawrence and Sylvia Hokkanen (titled *Karelia: A Finnish-American Couple in Stalin's Russia*), appeared only in 1991—a full half century after the experiences it describes.

It is clear enough that Communist party suppression of the subject among ordinary Finnish-Americans was made easier by the manipulation of Finnish cultural traits: Finns are "silent in two languages," Bertolt Brecht once said. But the pervasive sense that was spread among Finnish-Americans, that the fate of those who disappeared in Karelia was simply not discussed in polite society, also worked its way into general academic circles in the United States.

The case of former Finnish-Soviet agent Aino Kuusinen is instructive. As it happens, she worked in New York during the early 1930s as an illegal emissary of the Communist International and thus had an inside view on the entire organization of the recruitment of Finnish-American workers for Karelia. Nearly 40 years later, as a Gulag survivor and defector to Western Europe, she arranged for the posthumous publication of her memoirs, *The Rings of Destiny* (Morrow). The memoirs provided an authoritative account of the "monstrous swindle," as she called the Karelian immigration episode.

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She offered a vivid description of how the American migration hysteria known as "Karelia fever" was whipped up, describing how thousands of emigrants were enrolled at revivalist-style mass meetings, while Soviet steamers sailed from New York to Leningrad. "Many of the Finnish-Americans arrived from remote States like Oregon and California," she wrote, "in cars bought with the proceeds from the sale of their houses." But historians in the U.S. ignored her account as the product of "a weird imagination." Only recently, thanks to U.S. defense intelligence archives, has the general veracity of her memoirs been confirmed.

There is a remaining historical puzzle in all this. According to archival documents cited in *The Soviet World of American Communism*, Moscow wanted skilled workers in the early 1930s to help with "modernization" in Karelia. Finnish-American forestry workers were ideal because Karelia was largely Finnish-speaking and possessed an under-developed forestry industry. But what was the urgency behind the recruitment program? And why were these workers no longer needed after the mid-1930s?

If CNN's prestigious panel of historical researchers had pursued these questions, they would have found much that was unusually illuminating about the nature of the Soviet system of the 1930s—and illuminating in a way that would have been especially interesting for the network's American audiences. The answers do not lie in the published archives, but they are evident in the superb memoirs of a one-time Finnish-Communist leader, Arvo Tuominen, who saw what took place at the Karelian end of the deal while traveling in the region as a Soviet guest.

In Tuominen's neglected memoirs, *The Bells of the Kremlin*, he describes how many of the American loggers were put to work as slave laborers constructing the Stalin Canal in Karelia during the 1930s. The canal was built by a massive slave labor force working at breakneck speed with hand-held implements. (The death toll from the canal given by today's Russian authorities is approximately 250,000.) But the main point—not at all well known—is this: The plans for the canal called for it to be made almost entirely of *wood*. The canal was—and is—lined with huge trees, which could only have been logged from the Karelian forests with the aid of skilled lumberjacks.

Tuominen describes a tour of the canal he made in the summer of 1933—just a few days after its opening by Stalin: "Cement had hardly been used at all," he wrote with amazement. "One could not even imagine how many millions of trees had been used to line those long and deep canals with logs. And what logs they were, the straightest and thickest Karelian pine, all rounded and tarred! The locks were also wooden." (And still are—as may be seen in current tourist brochures of the area, now open to outsiders since the fall of the Soviet Union.)

Tuominen described Stalinist "natural selection" in action on the canal. Americans and others in the logging crews who felled and stripped the trees were given just enough food to stay alive. When almost impossible work norms were not met, the meager food allowances were reduced further, which in turn increased susceptibility to infectious diseases. A little way back from the canal were the bodies of thousands, "not even in regular graves, just buried like animals."

This is not to say that all of the Americans worked on the canal. As late as 1936, Tuominen spoke with Americans who had worked elsewhere in Russia and later found their way to Moscow. These "were among 'the Last of the Mohicans,'" he wrote, "who dared express their thoughts and not only to me. They spoke straight from the shoulder to the GPU men (the secret police) as well, with the result that, after a while, they lost even that freedom that had been theirs."

What spelled the end for most of these North Americans was the Terror of 1937-38, which led directly to the pits of Sandermakh and elsewhere—places where, as British author Robert Service described them in *A History of Twentieth-Century Russia*, "vans and lorries marked 'Meat' or 'Vegetables' would carry the victims out to a quiet wood . . . where shooting grounds and long, deep pits had been secretly prepared." Such killing fields are of course hidden all over the old Soviet Union.

Another photograph by Memorial's Veniamin Ioffe is of a general monument at Sandermakh, opened by the Karelian government in late August 1998. This monument is in memory not only of those who died at Sandermakh, but of all the victims of Stalinism in Karelia. Despite the large numbers of Americans and Canadians known to have been among these, to the best of my knowledge, no U.S. and Canadian officials were present at its opening.

Commentators such as Anne Applebaum have made the point that despite the collapse of communism in Russia, there still is little physical evidence of the unimaginable killings that took place under Stalin. Perhaps Sandermakh, with its wooden chapel in the Karelian forest, its monuments, and the nearby canal—never useful for anything more serious than tourist boats—may come to fill the void. Now a peaceful site of once terrible evil, Sandermakh would be an appropriate place in Russia for visitors—official and otherwise—to commemorate the victims of the waning twentieth century's cruelest delusion. ♦

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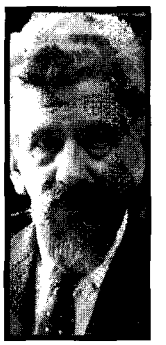
Protestant Catholic Jew



Theology and Politics at the End of the Century

It was at the end of the nineteenth century that Friedrich Nietzsche denounced the "flatheads" who imagined they could preserve morality without God. Nietzsche didn't think much of the Western ethical tradition, but he sensed that it needed the continuing presence of religion: The culture that loses God will eventually lose the concept of good and evil.

Here at the end of the twentieth century, we can begin to see just how right Nietzsche was, at least on this one point. Over the last twenty years, the intellectual and cultural life of America seems to have grown increasingly divided between two camps: those willing to sacrifice the last vestiges of traditional morality, and those open to bringing back God.

Among the latter, a major effort is underway to articulate a *public* theology—capable of reassuring believers that political life doesn't require them to abandon their religious principles, and capable of reassuring everyone else that those believers don't want to establish a theocracy. In recent years, Protestant, Catholic, and Jewish writers alike have been casting back through their traditions, seeking thinkers who examined the role of religion in democracy.

Editor's Note

Such rediscovered figures were often liberals in their own day, because they set themselves the task of explaining to their brethren why the health of religion in the modern world depends on accepting the principles of democracy. But they appear profoundly conservative today, because they managed to explain along the way why the health of democracy depends on religion.

The subjects of the following essays are the Dutch Calvinist statesman Abraham Kuyper, the Jesuit priest John Courtney Murray, and the Jewish activist theologian Abraham Joshua Heschel. These three figures from the last hundred years have achieved new prominence thanks to our pressing need to find a public theology fit for liberal democracy—and a liberal democracy fit for public theology.

—J. Bottum

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by Richard J. Mouw

Protestant

The Protestant Theology of Abraham Kuyper

With all the publicity given in the last few years to the rise of the Religious Right, it's hard to remember that there was a time, as recently as twenty-five years ago, when evangelical Christians were regularly criticized for their *lack* of participation in American politics.

Even in the nineteenth century, theologically conservative Protestants felt some dislocation from modern America. But the transition from the nineteenth to the twentieth century was, as the historian George Marsden puts it, something like an immigrant experience for American evangelicals—except that their migration from a familiar homeland to a strange new country was spiritual rather than geographical.

For a while, old-fashioned Protestants adopted a militant strategy, attacking their secularizing foes both inside and outside the Christian fold. But they were publicly humiliated at the 1925 Scopes Monkey Trial, and they suffered significant casualties from the intra-Protestant controversies that raged in the 1930s between the fundamentalists and the modernists. And they were left, in the end, with a deep pessimism about America, social reform, and participation in political affairs.

For the next fifty years, American evangelicals kept away from politics, concentrating almost exclusively on preparing individual souls for Heaven. During these years, they typically characterized the general culture with the kind of apocalyptic imagery first made popular by such nineteenth-century evangelists as Dwight L. Moody. The American ship is sinking, Moody had proclaimed, and the only proper public task left for evangelicals is to urge others to join them in the lifeboats—the enclaves of "Bible-believing Christians"—to await the coming apocalypse.

Needless to say, this evangelical mood of isolation changed dramatically when the evangelicals who had spent a half-century thinking of themselves as a marginalized minority—with an a-political or even anti-political worldview that denied the necessity to participate in American public life—suddenly roared into politics as the "moral majority" in the 1980s.

James D. Bratt, ed.,
Abraham Kuyper
A Centennial Reader
Eerdmans, 487 pp., $29

Their political reawakening over the last fifteen or twenty years has not been much welcomed by those who had grown accustomed to taunting evangelicals for escapism and failure to engage American culture. And there is some justice—mixed in with a far greater injustice—to the commonly heard leftist criticisms of this new evangelical politics.

But perhaps the most-telling criticism of evangelical politics is one it never occurs to secular critics to offer: Even while making much of the need for sound theology, American evangelicals did not explain how their political resurgence derived from any sound theological foundation. Life in the modern, post-Enlightenment democracies is a relatively new thing in the history of Christianity. But Roman Catholics—and those Protestants, like Lutherans and Anglicans, with experience of belonging to a state church—at least have some tradition of theological reflection on how believers ought to participate in public life. American evangelicals have few such resources.

The evangelicals sensed instinctively that something needed to be done about pornography, homosexuality, abortion, divorce, sex education, and the like. And so they launched their protest-driven programs—but without having decided exactly how to think theologically about pluralism, democracy, and the role of religion in the public square. Such figures as Jerry Falwell, Pat Robertson, and James Dobson proved better at inspiring their own followers than at reassuring the larger public that they were capable of working in a democracy for the common good.

The theological task, however, has not been completely neglected. Even though their efforts remain largely invisible to both grass-roots activists and leftist critics, evangelical scholars have devoted considerable attention to public theology. The retrieval of theological perspectives from the past has been high on the agenda in these discussions, as Christian theologians, philosophers, and historians have explored a variety of Protestant traditions—Calvinist, Lutheran, Anabaptist, Wesleyan—for ways to ground social activism in careful theological reflection.

Richard J. Mouw is president of Fuller Theological Seminary in Pasadena, California.

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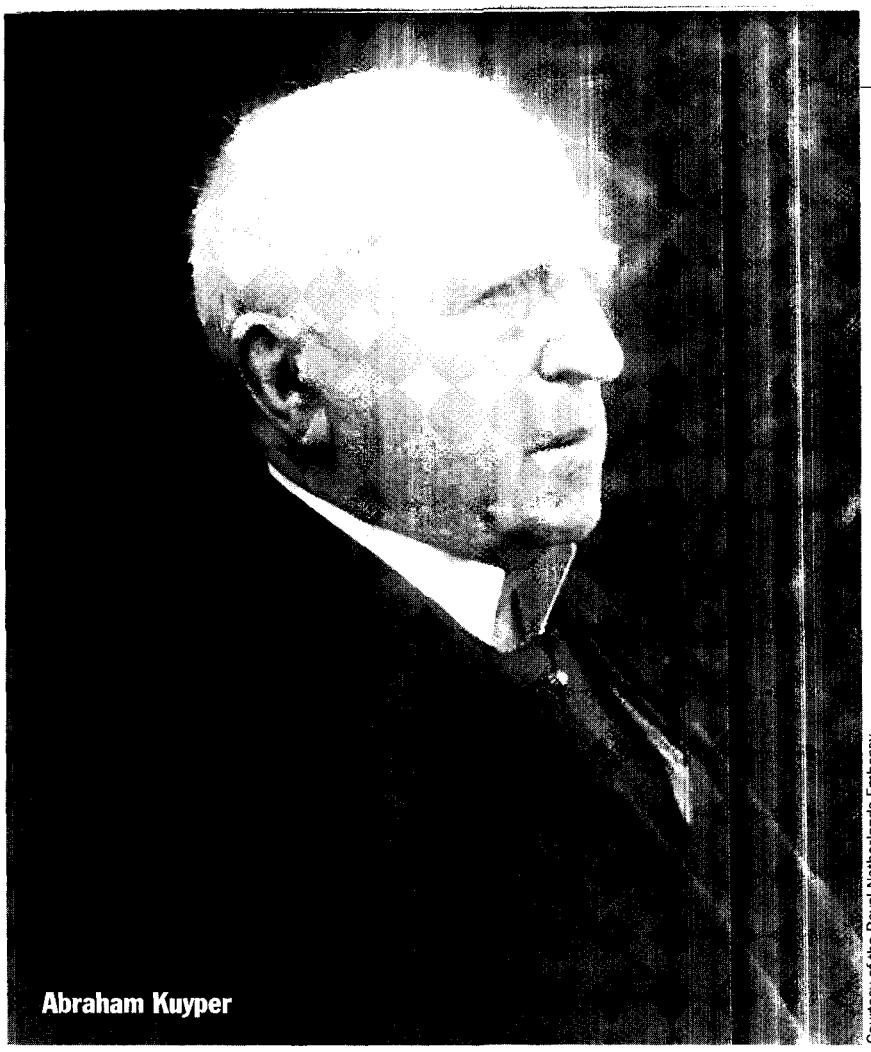

Abraham Kuyper

Courtesy of the Royal Netherlands Embassy

While the Dutch Reformed community in the United States forms only a small segment of the evangelical movement, its scholars have had a significant intellectual impact on conservative Protestantism, particularly on social and political topics. And the brand of Calvinism associated with Calvin College in Michigan and Dordt College in Iowa has drawn much of its inspiration from the example of the nineteenth-century Dutch statesman Abraham Kuyper (1837-1920), a Calvinist who exhibited an unusual blend of public activism, theological depth, and personal piety.

Kuyper was passionately evangelical in his insistence that the Bible provides a worldview in stark contrast with the secularists' depictions of human life. But he wasn't content simply to repeat past formulations. He saw the increasing fragmentation of our modern experience of reality, religious diversity, and democratic pluralism. Kuyper's way of putting this together is increasingly recognized by evangelical scholars as an important model for American religious thought. And even those who cannot endorse the particulars of his Calvinist convictions often point to his system as a benchmark for constructing evangelical models for religious participation in the public square.

When Kuyper studied theology at the University of Leiden, where he earned a doctorate in 1863, the school was a hotbed of revisionist theology. As a fledgling pastor called to a rural Dutch Reformed congregation, Kuyper was a theological liberal with little use for traditional orthodoxy. This changed quickly, however, when—largely through the influence of some uneducated but deeply spiritual parishioners—he experienced a profound evangelical conversion.

After ten years in parish ministry, Kuyper was elected to the Dutch parliament. For the next several decades, he led the Anti-Revolutionary party (which he helped to found), and he served from 1901 to 1905 as prime minister. He relinquished his clerical credentials when he entered political life, but he continued throughout his career to write theological tracts. For a half-century, he was a prominent figure in Dutch life; the collected newspaper cartoon caricatures of Kuyper would fill a good-sized volume. In addition to his political and theological efforts, he founded the Free University of Amsterdam, edited a newspaper, wrote popular religious devotional material, and led a breakaway group of churches that became the second largest Reformed denomination in the Netherlands.

In 1898, Kuyper visited the United States to receive an honorary doctorate and deliver the Stone Lectures at Princeton Seminary. In these lectures, he argued that Calvinism is more than a narrow set of doctrines; it provides a unique and comprehensive "world and life view"—a perspective that Kuyper spelled out in detail by giving separate lectures on the implications of Calvinism for religion, politics, science, and art.

For English readers, access to Kuyper on such topics has been limited mostly to these Stone Lectures. The appearance of a new hefty volume, *Abraham Kuyper: A Centennial Reader*, is consequently a major event. The essays in the collection, skillfully edited and introduced by James Bratt, display the range of Kuyper's intellectual contributions. While selections of his writings on some traditional theological topics are included, well over half of the volume—several hundred pages—is devoted to his reflections on social, political, and cultural themes.

Kuyper knew that he could not make claims for the contemporary relevance of his religious tradition without dealing with the tradition's past patterns of intolerance. Calvinists at the time of the Reformation, he observed, "yielded their victims, by tens of thousands, to the scaffold and the stake," a pattern he deplores "unconditionally." This should not be seen, however, as a unique practice instituted by the Calvinists, "but on the contrary as the fatal after-effect of a system, gray with age, which Calvinism found in existence, under which it had grown up, and from which it had not yet been able entirely to liberate itself."

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Calvinism's positive contribution to political thought, Kuyper argued, is in the form of principles that introduce a new way of viewing political life. Kuyper named his party "Anti-Revolutionary" because of his deep opposition to the thought associated with the French Revolution. By attempting to dethrone God in order to elevate autonomous Reason, that revolution paved the way not for democracy but for totalitarianism. In contrast, Calvinism was capable of providing a firm basis for a democratic faith.

Kuyper could be eloquent in his insistence on an intimate link between God's sovereignty and democratic ideals. If God alone is absolute, then no human government has the right to claim absolute authority over its citizens. And given the human propensity toward sinfulness, governments are both necessary shields against sin and themselves affected by our common depravity. Thus the need both to respect government's proper "ordering" role and to be clear about its limitations.

These notions, in Kuyper's scheme, had a direct link to pluralism. His doctrine of "sphere sovereignty" was set forth at length in his 1880 address at the founding ceremony for the Free University. The doctrine bears some strong resemblance to recent views about the way "mediating structures"—neighborhoods, service organizations, leagues, religious bodies—function as safeguards against both individualism and statism.

Kuyper insisted, however, that these safeguards require a theological underpinning. Mediating structures are not merely to be valued for their functions of shaping character and curbing the powers of the state. God built these patterns of associational diversity into the very fabric of creation. Families, schools, and businesses do not exist by the permission of governments or churchly authorities. God has ordained their existence, and no human power has the right to inhibit their proper functioning.

For Kuyper, associational diversity isn't an accidental feature of contemporary life. Kuyper's God has a distinct bias in favor of diversity in the creation, but He also has a profound interest in making sure that we respect the differences among the diverse spheres of interaction. One of his essays bears as its title a favorite Kuyperian phrase: "The Blurring of the Boundaries." The idea of "sphere sovereignty" generated, for Kuyper, a complex framework for discerning boundary lines and making distinctions.

The practical issues Kuyper faced in nineteenth-century Holland were never far from his mind. He was a lover of many things British and American, especially whatever he identified—sometimes in a confused manner, as editor Bratt shows in this new volume—with Puritanism. But he could quickly turn Anglophobe (and racist) in defending the Boers of South Africa. And his conviction that Calvinism is the highest expression of the religious spirit gives his writings a decidedly unecumenical tone: His references to Roman Catholicism and Methodism are seldom friendly.

A false choice is often posed to Christians: Either withdraw from the public arena or take it over. Kuyper proposed a third way, refusing both a state church and merely private religion.

But there is also much in his work that has a modern feel. His opposition to the French Revolution puts him in the company of those thinkers of our time, like Alastair MacIntyre, who scorn "the Enlightenment project." Kuyper's rejection of "neutral" rationality, however, did not lead him to reject universal reason. He sought instead a rationality harnessed to worshipful obedience to the Creator. Kuyper saw human beings as driven by trust. We are created to offer our fundamental allegiance to God, and when we turn away from God, we form other and idolatrous allegiances: We become, in John Calvin's striking image, perpetual idol-factories. For Kuyper, a recognition of this pervasive tendency toward idolatry should make us especially wary of philosophical reductionism.

Even Kuyper's vision of the diverse spheres of human life fits, in a rough way, with our contemporary mood: His analysis of social multiplicity is not unrelated to postmodernists' talk of "multiple narratives" and "irreducible discourses." But for Kuyper, the spheres of human interaction are ultimately linked by their mutual relation to the transcendent will of the Creator. The same God who wanted families to be a part of creation also made room for schools, corporations, teams, and legislatures. And, furthermore, God has very clear—and published—convictions about the basic norms we should follow as we go about the complex business of living.

The feature of Kuyper's thought that is of the most relevance, however—the thing that has made this unlikely Dutch politician an increasingly significant figure in American intellectual life almost eighty years after his death—is his way of dealing with the diversity of belief and practice in contemporary culture.

The tiny handful of reactionary Protestants who believe in theocratic domination of the state by the church have it easy—as do the liberal Protestants who have divided their religious belief from their public lives and entirely given up any pretense of a theologically informed participation in politics. For serious American evangelicals, however, things are more difficult, for they must affirm both the superiority of democracy and the possibility of making religiously informed moral judgments that have real effect in the public square. Even on the most charitable reading, there isn't much doubt that our present times cannot be squared with the Bible. We encounter these days

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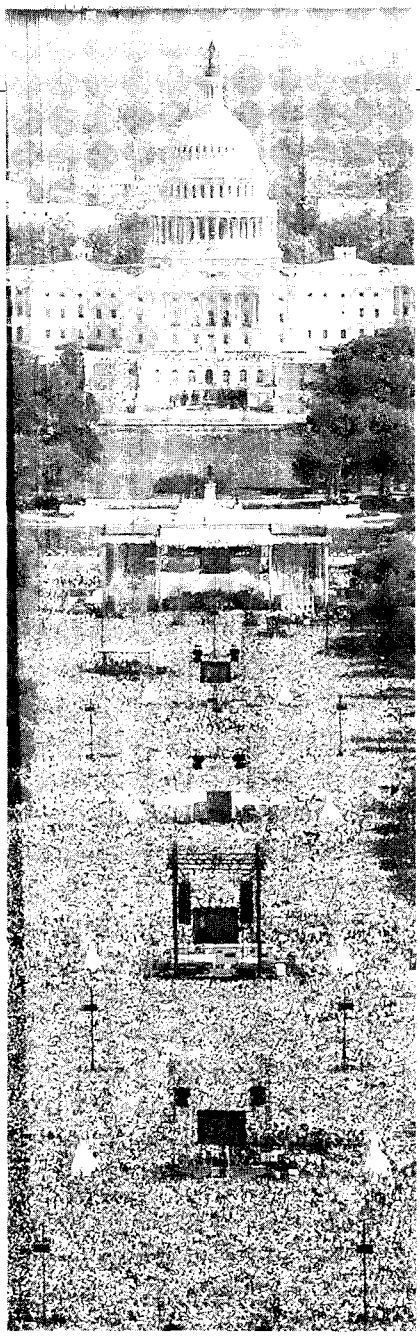
some deep and seemingly ineradicable evil in American society. How in a democracy do we make our peace—or our war—with this kind of thing?

Kuyper did not treat this challenge lightly. He was, after all, a Calvinist who believed in what he regularly referred to as the "antithesis" between belief and unbelief: People of faith have a radically different way of viewing life than that of nonbelievers. There was no doubt in his mind that the public square is one of the strategic places for waging the ongoing battle between righteousness and unrighteousness.

But he also demanded that these challenges be addressed out of a systematic Christian perspective on public life. It is this that distinguishes Kuyper from the evangelical activists who burst into American political life in the 1980s, for *systematic* theological justification for their activism is exactly what they lacked. The growth of interest in Kuyper since then is proof both of the increasing maturity of evangelical political life and of the wise refusal of at least some evangelicals to barter their theological principles for political influence.

Kuyper was aware of the false choice often posed to Christians: Either we must withdraw from the public arena or we must take it over. Kuyper proposed a third way, in which he refused to allow either a state-established religion or a religion that was merely a "private" affair. Kuyper wanted each confessional group to take its portion of public space, but none of them to have an official advantage. The proper role of the state is to show impartiality toward a variety of religious and moral perspectives: pluralism, not secularism.

Support for this kind of political arrangement does not come easily for those who nurture deep convictions about what is right or wrong. Recognizing these difficulties, Kuyper paid considerable attention to the spiritual and theological underpinnings necessary for democratic life. One standard theme he drew upon was the classic Calvinist emphasis on divine providence. God is ultimately in control of all that happens, and He is obviously willing to tolerate some bad human behavior for a time. Judgment Day is coming, but it has not yet arrived. We live in a time when righteousness and unrighteousness exist side by side, and believers must live with this fact in mind.



AP / Wide World Photos

Protestants in the public square: a Promise Keepers rally in Washington, October 1997.

The doctrine of original sin also functioned, in Kuyper's scheme, as a basis for Christian self-critique. The antithesis between righteousness and unrighteousness doesn't just divide righteous people from the unrighteous. The struggle against sin is also waged within the soul of each individual. The line between good and evil cannot be easily drawn between groups of people, Kuyper argued. Believers may have the right principles, but they continue to be plagued by their innate sinfulness. And unbelievers often perform better than might be expected from the perverse principles they sometimes serve.

This is spelled out at length when Kuyper develops his idea of "common grace." The notion that God works mysteriously in the hearts of the unregenerate, restraining their sinful tendencies and using their actions—even when they are motivated by wicked desires—to accomplish His purposes in the world, can be found in Calvin. But Kuyper gives a much more systematic treatment to the notion that there is a kind of grace which, while it does not bring about the salvation of the reprobates, does generate common blessings for all of humankind.

Two lengthy selections from Kuyper on common grace appear for the first time in English translation in Bratt's new Kuyper reader, and they constitute an important contribution to evangelical discussion. The doctrine of common grace is closely related to such theological themes as natural law and general revelation in Roman Catholicism—and it is interesting that these themes seem to be cropping up more frequently among Catholics (and Protestants, as well) than in the recent past. What contemporary Catholic thinkers in America are looking for in natural law is exactly what evangelicals are looking for in Kuyper's common grace: a way to combat the relativism—even nihilism—in our culture while simultaneously preserving the democratic institutions of our politics.

In such a setting, Kuyper's writings deserve sustained attention. The American evangelicals who rushed into politics in the 1980s have discovered that effective Christian activism requires clear thinking about the proper contours of the public square. As a successful politician, Abraham Kuyper may provide a model of Christian statesmanship. But it is as a thinker that he offers what we need most: a way for theologically informed Christians to grasp both what they should seek, and what they should not seek, from politics in a democracy. ♦

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Catholic

by Russell Hittinger

The Catholic Theology of John Courtney Murray

During the presidential campaign of 1960, John F. Kennedy, addressing a group of Baptist ministers in Houston, declared that he believed "in an America where the separation of church and state is absolute." His religion, he swore, was "his own private affair," and no public official should request or accept "instruction" from an ecclesiastical source—Catholic, Protestant, or Jew. He opposed public aid to parochial schools and an American ambassador to the Vatican. Neither should there be a "Catholic vote," or any other kind of religious vote.

His message was clear: A Catholic president would make no trouble, and neither would he make a positive contribution, at least not as a Catholic. Kennedy would embrace (as he assumed Protestants wanted) the privatization of religion.

A month after the election, *Time* magazine featured on its cover the Jesuit scholar and priest John Courtney Murray, whose book, *We Hold These Truths: Catholic Reflections on the American Proposition*, had been published a few months before. Though Kennedy's victory as the first Catholic president and Murray's appearance on the cover of a national news magazine seemed related—and probably *were* related in the minds of *Time*'s editors—any careful reader could discover that Murray's thought was at odds with Kennedy's.

Where Kennedy seemed perfectly happy to regard Catholicism as politically irrelevant, Murray argued that Catholics must use their philosophical and theological resources to contribute to the American political experiment. Both held that religious belief should not be imposed by the state. But for Kennedy the First Amendment not only protects Catholics from the Protestant majority, it also guarantees Catholics' privacy and saves them the embarrassment of mounting religiously informed public arguments. Murray held instead that by prohibiting state imposition of religion, the First Amendment liberates Catholics to carry their religious formation into political practice.

John Courtney Murray
We Hold These Truths
Catholic Reflections on the American Proposition
Sheed & Ward, 224 pp., $19.50 paper

It is tempting to say that Kennedy, by virtue of his political success, prevailed. But in fact, his First Amendment absolutism was already obsolete by the time he formulated it. In the almost forty years since he spoke in Houston, religion has erupted in public life: in struggles over race and the Vietnam war and prayer in schools, in the stands of Kennedy's own Democratic party on abortion and the privatization of religion that caused the flight of millions of traditionally Democratic Catholics to the Republicans. In retrospect, of these two Catholic figures of 1960, Murray has proved the more prophetic.

Born in New York in 1904, John Courtney Murray entered the Society of Jesus in 1920. Studying in Jesuit seminaries in Massachusetts and Maryland, he was ordained in 1933 and sent to Rome to work on a doctorate in theology at the Gregorian University. Except for a one-year visiting professorship at Yale, Murray taught in the Jesuit seminary at Woodstock, Maryland, from his return to America in 1937 until his death in 1967.

We Hold These Truths, Murray's best-known work, consists mostly of previously published essays. Beginning in the 1940s, Murray had argued that the history of the Church's direct governance of political things was an accident of the Middle Ages, when the Church had to supply political leadership after the collapse of the Roman Empire. In principle, however, the Church has no right to govern the political multitude. In 1954, he used statements by Pope Pius XII to support his own argument that religious liberty is something to be not merely tolerated but defended in principle.

Murray undoubtedly fashioned overly favorable interpretations of Church decrees, and his polemics sometimes ran ahead of his sources. Although censured by his Jesuit superiors, he continued to write and speak on American public affairs. (President Eisenhower appointed him to the Atomic Energy Commission.) During the Second Vatican Council in 1962, Cardinal Spellman named him a *peritus*, or theological adviser, and Murray is usually credited with being the main intellectual force behind the council's declaration on religious liberty, *Dignitatis humanae*.

But in fact, there was no one at Vatican II actually suggesting that the state

Russell Hittinger is Warren Professor of Catholic Studies and research professor of law at the University of Tulsa.

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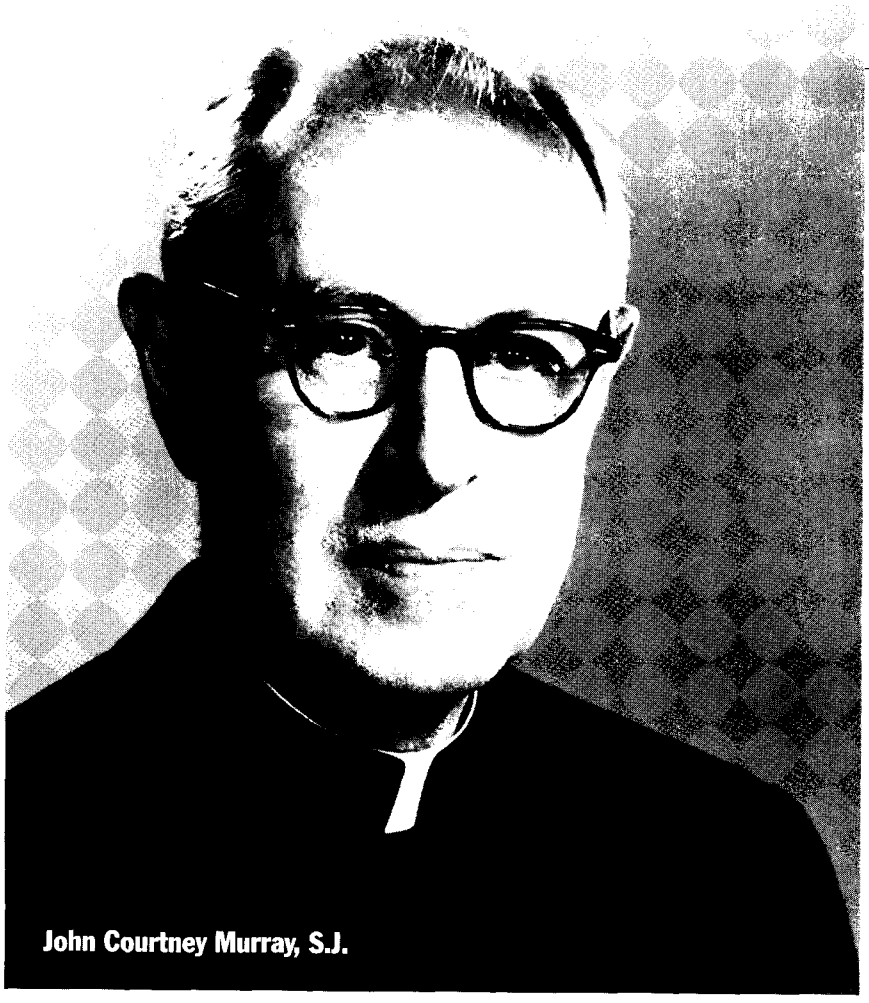

John Courtney Murray, S.J.

should make unbelievers profess the Catholic faith. That kind of coercion had always been ruled out in principle (though not always in practice). Nor was there anyone suggesting that Catholics should refuse to give allegiance to secular states.

The question before the Second Vatican Council was rather whether, given "ideal" conditions—when they constituted the majority in a democracy—Catholics ought to force the state to adopt Catholicism as its official religion. The traditional teaching was yes. Understandably, this was not often preached for public consumption in the United States, but it was no secret either. And the question for Catholics and non-Catholics alike was how Catholics could be good citizens if their doctrine required them to lie in wait for those conditions that allow a confessional state.

The view of church-state relations taken by American Protestants, both before and during America's Founding, was born from the historical lessons of European experience. The absolute monarchs of the sixteenth and seventeenth centuries had used religious unity as an excuse for state authority and power, and American Protestants were determined that the excuse would not arise in their new country.

Catholics, on the other hand, received their historical lessons from the French Revolution and its aftermath. The European states born in revolution waged war against the Church. Pius VI was attacked by the French Directory for rejecting civil marriage and divorce, resisting the civil appointment of clergy, and condemning the elevation of the Goddess of Reason as the official French deity. His successor, Pius VII, was detained by Napoleon. From 1789 onwards, the Catholic Church suffered such bad relations with European governments that its main concern was not imposing Catholicism but eking out some modest liberty for itself.

But the struggle with revolutionary regimes did some good things for Catholicism. It made the Church extremely suspicious of the centralized state and weaned Rome from thinking of civil government as an instrument for religious orthodoxy. In his Christmas radio address of 1944, Pope Pius XII surveyed the disaster of Europe and declared that democracy "appears to be a postulate of nature imposed by reason itself" because it affords some check upon the power of dictators. This anti-statist view would find its way into the Vatican II's statement on the Church and the modern world, *Gaudium et spes*. "As for public authority," the council declared,

> it is not its function to determine the character of the civilization, but rather to establish the conditions and to use the means which are capable of fostering the life of culture among all even within the minorities of a nation.

So too, by depriving Rome of the political powers it had previously enjoyed, the revolutionary European states forced the Catholic Church to relearn its ancient role as primarily a moral teacher. The tradition of issuing encyclical letters, perfected by Pope Leo XIII in the late nineteenth century, represented an enormous change in Rome's stance toward secular political authorities. Rather than giving direct political orders, it would teach; rather than baptizing the government, it would inform the culture. These developments not only doomed the old conservatives' model of a confessional state. They would doom as well the newer liberationist theologies that looked to the state as an engine of radical social change.

By the end of the Second World War, European émigrés like Jacques Maritain and Yves Simon were writing books showing a congruence between Anglo-American political institutions and Catholic social theory. And John Courtney Murray began putting together his ingenious argument for reconsidering religious liberty in light of the American experience.

The first thing Murray had to do was show that the French model is "a deformation of the liberal tradition." Any rapprochement between the Catholic mind and the American experiment required showing that liberal, democratic America is not to be confused with the radical Enlightenment.

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The second thing Murray had to do was bring into relief those aspects of the American order that are especially amenable to Catholic tradition. These included the ideal of limited government and checks upon the power of the state, the medieval English tradition of common law, and the natural-law foundation of the American order.

And the third and most important thing Murray had to do was give an explanation for why the political state should not be an instrument of the Church. This was the sore point in America. Murray contended that "Christian constitutionalism" recognized that society is governed by two authorities. "Two there are," as the fifth-century pope Gelasius had put it in a letter to the emperor Anastasius, "by which this world is chiefly ruled: the sacred authority of the priesthood and the royal power." Murray viewed Western history as an ongoing struggle to resist any slide into a "monism" with one power subordinated to the other.

But the key to Murray's thought was his argument that neither of these powers can supplant the "conversation" of society. The free society is not reducible to ruling powers. "Government submits itself to judgment by the truth of society; it is not itself a judge of the truth in society." And for its part, the Church ought not to control the society, but influence it through teaching. Church and state can collaborate precisely because neither can replace the moral conversation of the people. For Murray, the American genius was to revive the old—and fundamentally Catholic, he daringly asserted—distinction between society and the state. Society must be free to engage in robust debate about the truth, and the function of the state is to protect the freedom that allows this debate to take place.

It sounds odd to say that John F. Kennedy—the model of a dynamic, young Catholic layman—was really an old-fashioned Irish Catholic: The laity pray, pay, and obey, and then go about their secular business. When he addressed the Baptists in Houston, Kennedy supposed that there is a private sphere in which one must obey the Church and a public sphere in which religion has no place.

By the late 1960s, Kennedy's path of private religion had proved unworkable. In Catholic pulpits and universities across the country, the laity were reminded of their obligation to take religiously and morally informed positions against racism first, then poverty, and then the Vietnam war (even though there had been considerable Catholic support for America's fight in Vietnam, at least during the early 1960s when South Vietnam had Catholic leaders).

But the watershed was *Roe* v. *Wade* and the legalization of abortion in 1973. New York governor Mario Cuomo made an effort to resurrect Kennedy's public-private dichotomy, arguing that he was "personally opposed" to abortion even while he supported the Court's decision to legalize it. But in fact abortion had already made it impossible to turn back to merely private Catholic opinion about public things. Catholic liberals found themselves in an awkward position: Having argued throughout the 1960s that the moral energies of Catholicism ought to be devoted to social issues, how could they justify quietism on the life issues?

It was among conservatives after Roe v. Wade that Murray was rediscovered as a major resource for believers taking stands on public issues in a democracy.

It was rather among Catholic conservatives in the years following *Roe* v. *Wade* that John Courtney Murray was rediscovered as a major resource for explaining how believers could take religiously reasoned stands on public issues in a democracy without undermining the principles of that democracy. Indeed, it was the rediscovered Murray who provided such thinkers as Michael Novak and Richard John Neuhaus with the notion that democracy actually *depends* on the constant participation of its religious believers.

Murray's position was a delicate balancing act. On the one hand, he required Catholics to take a "low" reading of the Catholic tradition: A government without an established religion cannot be addressed in the language of Christian revelation, and so Catholics making public arguments in America must argue from generally accessible, naturally known truths about law and morality. Direct theological discourse should be reserved only for the conversation of the society, not the state.

On the other hand, Murray required Catholics to take a "high" reading of the American tradition—for it is a high reading of America to see the nation as founded on the principles of natural law and thus open to the most serious moral conversation about public policy. In *We Hold These Truths*, Murray suggested that America's institutions are too good to rest upon the empiricist, pragmatic, and skeptical ideologies of the Enlightenment.

Like other intellectuals of his generation, Murray thought that the mid-century crises of fascism and communism would induce the democracies to return to a classical moral order. One of the lessons of *Roe* v. *Wade* is that he underestimated the darker forces in American culture. But in one of the more pessimistic passages of his book, Murray did speculate briefly about the possibility that non-Catholics would abandon their belief in an objective moral order even as Catholics were at last entering the civil conversation:

> If that evil day should come, the results would introduce one more paradox into history. The Catholic community would still be speaking in the ethical and political idiom familiar to them as it was familiar to their fathers, both the Fathers of the Church and the Fathers of the American Republic. The guardianship of the original American consensus, based on the Western heritage, would have passed to the Catholic community.

Murray was the first Catholic thinker of any influence to see the role

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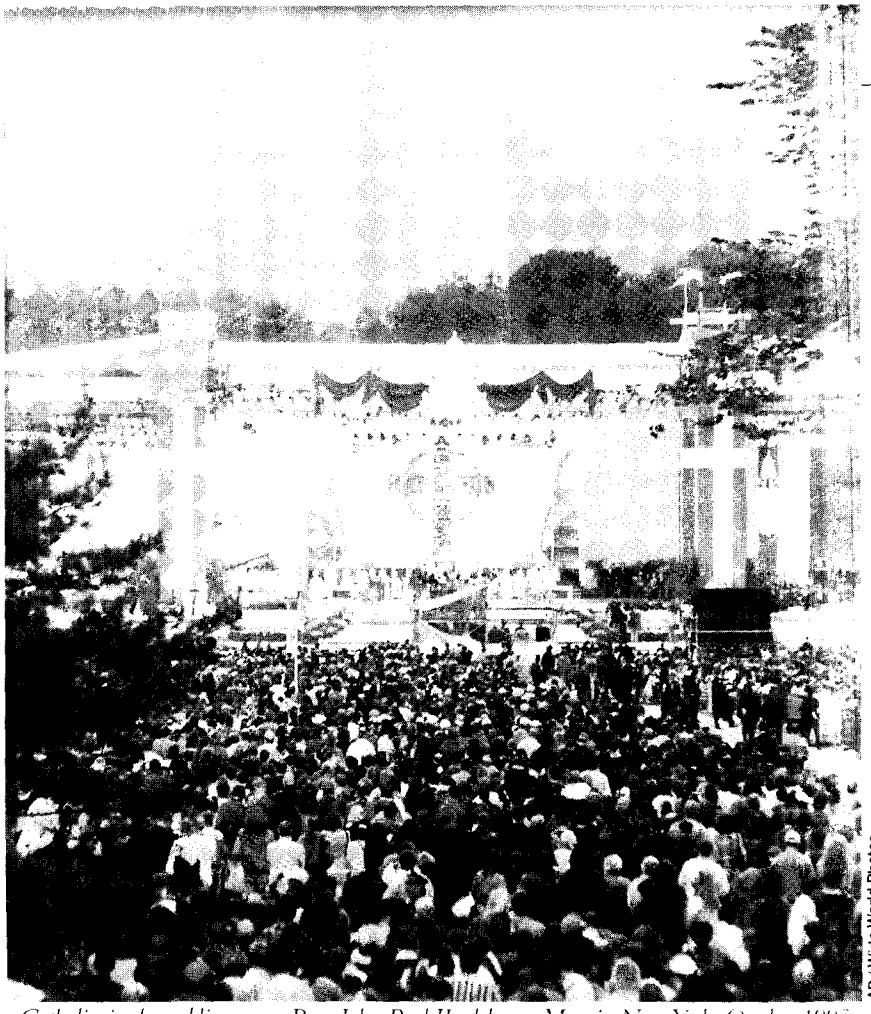

AP / Wide World Photos

Catholics in the public square: Pope John Paul II celebrates Mass in New York, October 1995

of the Supreme Court in distorting the proper roles of church and state. In the 1948 *McCollum* decision, the Court had ruled unconstitutional voluntary religious instruction in public schools. Justice Frankfurter contended that the instruction "sharpens the consciousness of religious differences at least among some of the children committed to its care." Even voluntary religious activity in public schools makes students aware of their differences along religious lines, and thus subverts the schools as the primary "symbol of secular unity."

Murray warned that the Supreme Court was erecting a notion of the First Amendment that "cannot be approved by the civic conscience because it is a radical departure from our Federal constitutional tradition. And it cannot be approved by the religious conscience because it is, in effect, a legal victory for secularism." Here was the state using public law to supplant the conversation of the free society: The Supreme Court seemed to imagine that because the state must be neutral among religions, so too must society be neutral. Murray warned that this was precisely the kind of "monism" against which America's Protestant Founders had reacted. Although Catholics in 1948 had intact their fleet of parochial schools and so were less immediately affected by the new jurisprudence, Murray urged them to "make common cause" with Protestants.

In recent decades, the Catholic church has made an enormous investment in the principles and institutions of free society. Even more than John Courtney Murray, Karol Wojtyla was a mover behind Vatican II's declaration on religious liberty. And when Wojtyla became Pope John Paul II, he began to teach that religious liberty protects a truth-seeking society against the state trying to remake society in its own image. He learned this lesson in Poland rather than America, and perhaps for that reason he sees clearly how moral relativism can turn the principle of religious liberty upside down: When the state affirms certain truths for the society, the state is imposing something tantamount to a religion.

In his 1995 encyclical *Evangelium vitae*, John Paul II laments that the democracies are retreating from their own best insights. In a passage that seems aimed at such successors of Kennedy as Mario Cuomo, he points out that the notion of a morally neutral public sphere contains an intolerable contradiction:

> On the one hand, individuals claim for themselves in the moral sphere the most complete freedom of choice and demand that the State should not adopt or impose any ethical position. . . . On the other hand, it is held that, in the exercise of public and professional duties, respect for other people's freedom of choice requires that each one should set aside his or her own convictions.

In 1960, John F. Kennedy opted for the secularist myth of merely private religion. John Courtney Murray understood instead that Catholics would have to do some serious reinterpreting in order to participate in the political life of American democracy: first, reinterpreting the Catholic tradition in order to accommodate America; and second, reinterpreting the American tradition in order to accommodate Catholicism. For a while, it was Catholic liberals who championed Murray for his role in changing the Church's official position on democracy. But he also insisted that Catholics would have to hold America to its highest moral traditions. And the first reinterpretation turned out to be much easier than the second.

Lindy Boggs, from a stalwart Louisiana Democratic family, became the U.S. ambassador to the Vatican in 1997. According to diplomatic protocol, she presented her credentials to Pope John Paul II, who took the occasion to give a pep talk on the "self-evident" truths of the Declaration of Independence. "It would be a sad thing," the pope remarked, "if the religious and moral convictions upon which the American experiment was founded could now somehow be considered a danger to free society." More than anything else, this little moment at the Vatican reveals Murray's legacy. ♦

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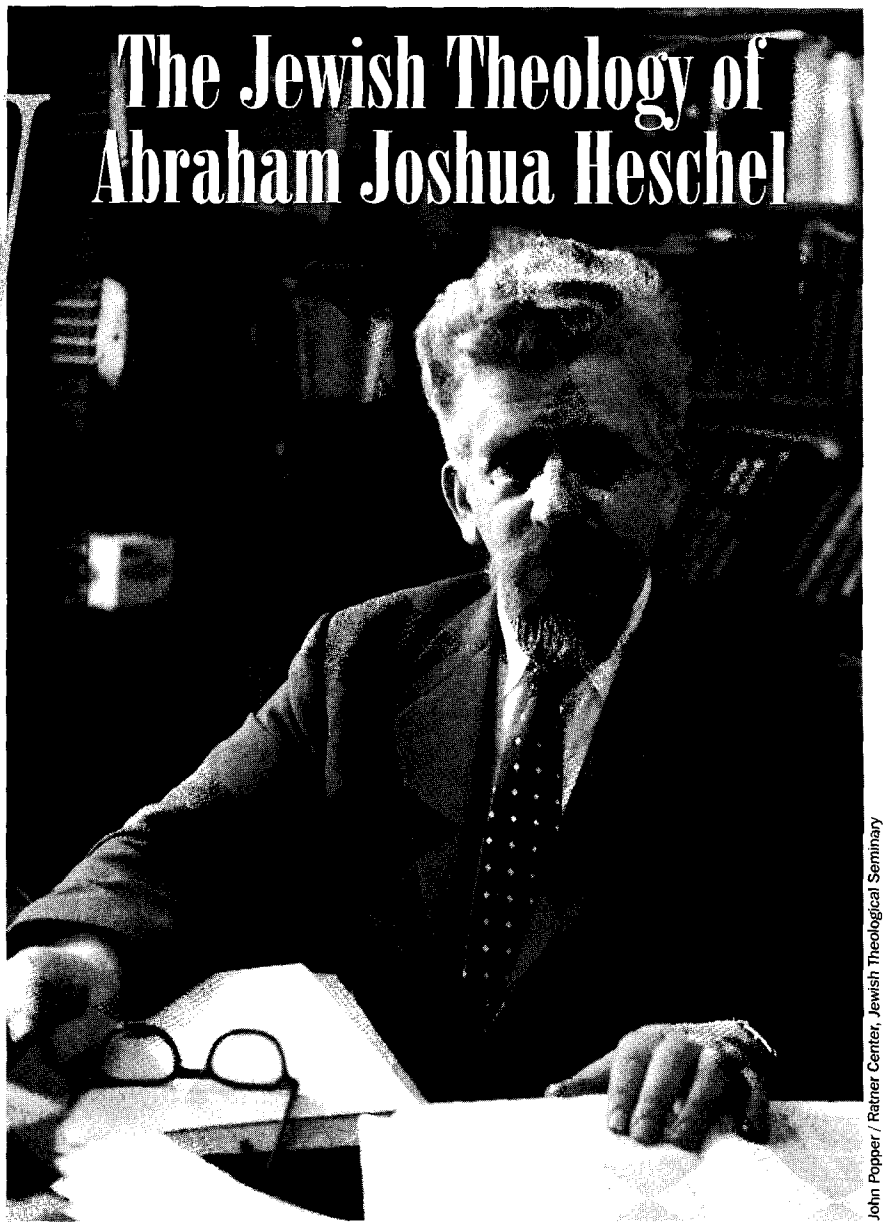
The Jewish Theology of Abraham Joshua Heschel

by David G. Dalin



John Popper / Ratner Center, Jewish Theological Seminary

Before his death in 1972, Abraham Joshua Heschel was widely considered to be one of the most influential Jewish religious thinkers of the twentieth century. In 1951, reviewing Heschel's *Man Is Not Alone* on the front page of the *New York Herald Tribune*, no less a figure than Reinhold Niebuhr predicted that Heschel would soon become "a commanding and authoritative voice not only in the Jewish community but in the religious life of America."

Heschel fulfilled the prophecy. Like Niebuhr (who later became his close friend), he achieved prominence as a public theologian who sought to apply his religious tradition to political and social issues. During the last decade of his life, he became a media celebrity and one of American Jewry's most outspoken activists: the keynote speaker at the 1960 White House Conference on Children and Youth, a leader of the civil-rights and anti-Vietnam War movements, a passionate advocate of environmentalism and disarmament, and the first American-Jewish leader to protest publicly the plight of Soviet Jews. His activist friends, the Protestant chaplain William Sloan Coffin and the radical Jesuit Daniel Berrigan, dubbed him "Father Abraham."

Today, however, one dimension of his legacy remains ignored. Although Heschel was revered by many as the Jewish community's preeminent social critic—unabashedly appropriating the writings of the Hebrew prophets to support the liberal political causes he espoused—the greater part of his legacy as a public theologian seems, in retrospect, more *conservative* than liberal. The particular social battles Heschel fought, almost always on the side of the Left, are long over. What remains is his constant awareness—apparently possessed nowadays only by the Right—that an American moral and political culture uninformed by religious belief threatens the health of a democratic society and undermines the position of Jews.

The recent publication of the first volume of a major new biography, *Abraham Joshua Heschel: Prophetic Witness*, by Edward K. Kaplan and Samuel H. Dresner, provides a welcome opportunity to reflect upon the man's extraordinary life and thought. In this volume, Kaplan and Dresner trace in illuminating detail Heschel's life from his birth in Warsaw in 1907 through his arrival in New York in 1940. They describe his religious and intellectual journey from his childhood in a Hasidic community through his years in secular Jewish Vilna, Berlin, and Frankfurt during the late 1920s and 1930s—seeking to

David G. Dalin is an ordained rabbi and a visiting associate professor at the Jewish Theological Seminary. He is co-author, with Jonathan D. Sarna, of Religion and State in the American Jewish Experience.

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discover how Heschel's first thirty-three years in Europe made him into the religious philosopher, biblical theologian, and American social activist he would later become.

A descendant of an illustrious line of Hasidic rabbis, Heschel was a child prodigy who had read all the books in his father's library by the age of ten. After receiving Orthodox rabbinic ordination at the age of sixteen, he began privately studying German, Polish, and Latin to prepare himself for secular high-school studies in Vilna ("the Jerusalem of Lithuania," as the authors describe the city). As he left Warsaw—and the traditional, insular world of Polish Hasidic piety—Heschel shaved his beard and earlocks. And it was in Vilna that he laid the foundation for his later involvement with leftist causes, living among "secular Jews who supported revolution" and studying "avant-garde politics and literature."

At the age of twenty, Heschel left for Germany to pursue his doctoral studies in philosophy and theology at the University of Berlin, which he completed within days of Hitler's ascension in 1933. On February 11, he successfully completed the oral defense of his doctoral dissertation on the Prophets, just weeks before Jews were expelled from the German academic system.

A secular career closed to him by the Nazis, Heschel devoted himself to Jewish education and scholarship, completing in 1935 a biography of the medieval Jewish philosopher Moses Maimonides and teaching at Berlin's liberal rabbinical seminary. In 1937, Martin Buber (who was emigrating to Palestine) invited Heschel to succeed him as the director of a Jewish adult-education organization in Frankfurt. In this new job, Heschel received considerable moral support from the anti-Nazi Quaker community in Frankfurt and its leader, Rudolf Schlosser. In 1938, at Schlosser's request, Heschel delivered a public lecture, "The Meaning of This Hour," on the moral responsibility of religious leaders in Germany. With this searing indictment of the Nazis, he became a "prophetic witness" to the plight of his fellow Jews. And he addressed for the first time the obligations of religious believers in times of political crisis—a theme that would define his public theology and social activism in America in the 1960s.

On October 28, 1938, along with eighteen thousand other Jews with Polish passports, Heschel was expelled from Germany—awakened in the middle of the night by the Gestapo, ordered to pack two small suitcases, and marched off to the nearby railroad station. After a brief stay in a displaced-persons camp, he returned to Warsaw, where he taught for the next academic year at the Institute for Jewish Studies.

Edward K. Kaplan and Samuel H. Dresner
Abraham Joshua Heschel
Prophetic Witness
Yale University Press, 416 pp., $35

Between November 1938 and June 1939, Heschel desperately sought a way to escape to the United States. And in the spring of 1939, he received an invitation from Julian Morgenstern to join the faculty of Hebrew Union College, the Reform rabbinical seminary in Cincinnati, Ohio. Awaiting a visa to the United States, Heschel left for London, where he studied English and founded an adult institute for Jewish studies. His departure, he would later say, was "just six weeks before the disaster began." Two years later, Heschel's mother and two sisters, whom he had been unable to rescue from the Warsaw ghetto, were murdered by the Nazis.

Arriving in the United States in 1940, he spent five years as an associate professor in Cincinnati, where he began to write prolifically in his adopted language. In 1945, Heschel accepted an invitation to join the Jewish Theological Seminary in New York, where he would remain a professor of Jewish ethics and mysticism until his death.

Heschel's reputation as the spiritual voice of American Jewry was established in 1951 with the publication of both *Man Is Not Alone* and *The Sabbath*. In subsequent years, he wrote some of the best-known and most widely read Jewish books of his generation: *The Earth Is the Lord's*, *A Passion for Truth*, *God in Search of Man*, and *The Prophets*. During the 1950s and 1960s, his writings enjoyed a wide audience among Christian theologians. Even before Heschel's much-publicized role in the Catholic Church's historic declaration on the Jews at the Second Vatican Council, Pope Paul VI read his books, as did the head of the committee that drafted the declaration, Cardinal Bea (who wrote Heschel to acknowledge "a strong common spiritual bond between us").

More than any other Jewish theologian of his generation, Heschel became an influential presence in American public life. From the 1962 publication of his monumental work on biblical theology, *The Prophets* (an expanded translation of his Ph.D. thesis), until his death ten years later, Heschel appropriated the teachings of the ancient prophets to lend support and spiritual "authenticity" to the radical causes that he came to espouse.

Indeed, Heschel is best remembered today for his "prophetic" role as a leader of the anti-Vietnam and civil-rights movements. In 1965, he co-founded (with Richard John Neuhaus and Daniel Berrigan) "Clergy and Laity Concerned About Vietnam." The former *New York Times* religion writer Peter Steinfels recalls, "it was hard not to imagine that God himself was coming out against the war" when Heschel rose to say the closing prayer at the group's initial meeting in Manhattan's Riverside Church.

But Heschel's prophetic role had found its quintessential expression even earlier, in his friendship with Martin Luther King Jr. Like Hes-

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chel, King invoked and venerated the ancient prophets as paradigmatic social critics and identified their biblical religion with political activism. When Heschel joined the famous march from Selma to Montgomery in 1965, he walked at the head of the procession with King, Ralph Bunche, and Ralph Abernathy. As his daughter Suzannah has recently noted, the photograph of Heschel walking arm in arm with King has become "an icon of American Jewish life and of Black-Jewish relations," reprinted in innumerable Jewish textbooks and synagogue bulletins.

Heschel and King first met in January 1963 at the National Conference on Religion and Race in Chicago—at which Heschel began his opening address with the words:

> At the first conference on religion and race, the main participants were Pharaoh and Moses. . . . The outcome of that summit meeting has not yet come to an end. Pharaoh is not ready to capitulate. The Exodus began, but is far from having been completed. In fact, it was easier for the children of Israel to cross the Red Sea than for a Negro to cross certain university campuses.

He electrified his audience with the speech. The prophets' great contribution to humanity, he thundered, was the discovery of the "evil of indifference": By "negligence and silence we have all become accessory . . . to the injustice committed against the Negroes by men of our nation." Challenging his audience "to reach out for new heights," he coupled his analysis with a call to social action: "Equality as a religious commandment goes beyond the principle of equality before the law. Equality as a religious commandment means 'personal involvement.'"

Before he appeared on the scene, only Reform Judaism had played a prominent role in the struggle for civil rights. Heschel made it respectable, even necessary, for leaders of Conservative and Orthodox Judaism to become involved as well. And one legacy of Heschel's involvement with Martin Luther King is the way it made mandatory the presence of Jews alongside Protestants and Catholics whenever religious stands are taken on public issues.

Zionism was another cause to which Heschel was deeply committed. He had been active in Zionist work in Warsaw and Germany, and he greeted the establishment of the State of Israel in 1948 as a miracle. During the 1950s, the hostility of Egypt, supported by Soviet arms, convinced both Heschel and Reinhold Niebuhr "that the very life of the new nation of Israel is at stake." The United States, they believed, needed to overcome its reluctance to supply Israel with weapons. It was Heschel's visit to Israel immediately following the Six-Day War in 1967 that inspired his *Israel: An Echo of Eternity*. The book, which remains one of his most popular works, was an attempt to explain why the Holy Land is precious to Jews. Heschel did not attempt to rationalize the Holocaust by interpreting the birth of Israel as an "atonement" (either by God or the United Nations). But the success of Zionism represented for Heschel at least a partial answer: "Israel enables us to bear the agony of Auschwitz without radical despair, to sense a trace of God's radiance in the jungles of history."

Though Heschel was "a man of the left," he embraced a view of religion and public life that was decidedly less liberal than conservative.

Heschel argued, moreover, that post-Holocaust Jewish theology would have to be predicated upon a sober recognition of human limitations. In presenting his view of God and Judaism during the 1950s, Heschel had criticized the theologians of the 1930s and 1940s who had espoused a liberal, rational approach to God. "Evaluating faith in terms of reason," he wrote in *Man Is Not Alone*, "is like trying to understand love as a syllogism and beauty as an algebraic equation." The Holocaust in Germany and the barbarities of Stalinism in Russia seemed to both Heschel and Niebuhr to have destroyed the foundations of the liberal faith—shared by Reform Judaism and liberal Christianity—in the "natural goodness" of man. Liberal Jewish theology, Heschel maintained, fails to answer the critical question of how the evil we have seen in the twentieth century could possibly have arisen.

Thus, even while Heschel became a liberal icon during the 1960s, his Jewish theology was, in many respects, far from liberal. And the limits of his liberalism were not merely in theology: He was no pacifist, for example, when Israel's security was at stake. He did call upon both Jews and Arabs to work together for peace. But he was unrelenting in his criticism of those who refused to recognize Israel's right to exist. Indeed, Heschel's unequivocal commitment to a militarily secure Israel would separate, in the years following his death, his thought from that of his former friends and associates.

Even Heschel's view of the relation between theology and politics seems more conservative than liberal in today's setting. Since the 1940s at least, most Jews in America have desired a rigid distinction between religion and public life. According to the liberal Jewish consensus that prevailed from the 1950s to the 1970s, Jewish survival and religious freedom are most secure when the wall separating religion and state is strongest.

Heschel dissented from this liberal Jewish consensus. As a public theologian for whom political and social problems were the main concern, he could not subscribe to any view that religious values and theological

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Courtesy of the Library of the Jewish Theological Seminary

Abraham Joshua Heschel, second from right, marches with Martin Luther King Jr. in a civil-rights protest.

insight should be expunged from American public life. Late in life, he had increasing misgivings about the efforts of some liberal Jewish leaders to challenge the constitutionality of tax exemptions for churches. The growth of Jewish day-school education, to which Heschel was deeply committed, prompted him to rethink his own earlier opposition to state aid for parochial schools.

After all, on such church-state policy questions—as on civil rights, disarmament, and the Vietnam War—Heschel believed that his religious commitment shaped his political involvement: The political protests he led and participated in were, as his daughter has noted, "a religious experience" for him. "To speak about God and remain silent on Vietnam," he once asserted, "is blasphemous."

Heschel's relating of biblical theology to politics seemed inescapably relevant during the tumultuous 1960s, and Heschel, more than any other Jewish thinker of his era, struck a responsive chord among many Jews in America. But that was because of the liberally approved positions that he derived from his theology.

His general view of the relation of religion to politics was, in fact, a considerable departure from the prevailing Jewish consensus—and remains today much closer to the neoconservative view that most liberal Jews oppose. Believing that religion had a legitimate place in American public life, Heschel rejected the view that the interests of American Jews are best served by what his old friend Richard John Neuhaus would later dub "the naked public square"—the banning of all religion from American political life.

In the quarter century since his death, Heschel has remained someone still much invoked in moral and political debate within the American Jewish community. And yet, although Heschel was "a man of the left," his prophetic radicalism led him to embrace a view of the proper relation between religion and public life that was decidedly less liberal than conservative.

His dissent on such issues has often gone unnoticed in evaluations of his life and thought. But it is one of his most important legacies, and it demands to be critically analyzed, in substantive detail, in the second volume of Kaplan and Dresner's so-far excellent biography. ♦

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Saddam Puts His Faith in History's Judgment

■ Iraqi dictator has found inner peace

By ELIZABETH SHOGREN
TIMES STAFF WRITER

BAGHDAD—In his first American interview in many years, Saddam Hussein told Oprah Winfrey that it is time to end the politics of personal destruction. "I think it's time to put my gassing of the Kurdish villages and all that other germ warfare stuff behind us," the Iraqi leader declared, looking drawn and emotionally spent. He added that while he may have not been fully forthcoming with the UNSCOM inspectors, he never actually deceived them. "It depends on what you mean by the word anthrax," he told Oprah at one point.

Still, Saddam said this has been a trying year. "I've had to do a lot of soul-searching," he said. "I know I have caused my extended family a lot of pain," he confessed, referring to his tendency to assassinate his brothers-in-law. "No cruise missiles could degrade my sense of well-being as much as the pain I have caused myself," he said, tears welling up in his eyes. He added that he initially did not mean to massacre the wives and children of opposition leaders. "I gave in to my shame," he added with a shrug.

"At times like these I have sought solace in the company of burly thugs with bushy black mustaches exactly like my own," Saddam said, referring to the support group that has emerged in Baghdad in recent months. "Other times it was just me, Tariq Azziz, and Kofi Annan sitting around eating ice cream out of a tub, just talking and hugging and crying," he remembered. "We rented 'Waiting to Exhale' a lot. That helped get me through the lonely times. And of course 'Natural Born Killers.'"

Saddam emphasized that it was important that he remain "an angel of light" and not give in to the dark motives of his enemies. "They only conquer me if their hate captures the sweetness of my heart. They only attain their objectives if their blackness dims my inner beam," Saddam declared, quoting Richard Simmons. Accordingly Saddam claimed he has purged himself of any hatred he may have felt toward President Clinton or the "vast Zionist conspiracy" he believes is working to oust him. "They are consumed by hatred," he said. "I mean, how constructive is a laser-guided missile? What does that do to extend health insurance to those who need it? I may be guilty of a few small genocides, but does that really rise to the level of a massive air assault?" Saddam reminded his listeners that Winston Churchill had also been subjected to bombing raids. "I am at peace with myself. I have embraced myself fully and touched the inner Saddam."

Mr. Hussein's book, "You Can Be Your Own Republican Guard," will be published this spring.

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ONCE IN A BLUE MOON PEOPLE DO THE IMPOSSIBLE

BEHOLD THE WONDERS OF TECHNOLOGY. SPECT EAKTHROUGHS THAT LEAD TO HISTORIC MILESTONES. AND STEAD VANCEMENTS THAT QUIETLY TRANSFORM HUMAN LIVES. SPACE TECHNOLOGY DOES BOTH: LAUNCHING EPIC EVENTS SUCH AS THE FIRST LUNAR LANDING AND GENERATING THOUSANDS OF INNOVATIONS THAT EMPOWER THE PEOPLE OF EARTH. GPS UNITS TO DIRECT EMERGENCY RESPONSE TEAMS. CONTROLS TO GUIDE MOTORIZED WHEELCHAIRS. MRI, PET AND CAT SCANS TO DETECT ELUSIVE DISEASES. SATELLITE IMAGERY TO MONITOR DANGEROUS STORMS AND KEEP THE PEACE. CELL PHONES AND COMMUNICATION SATELLITES TO EXTEND OUR REACH WORLDWIDE—AND A HOST OF OTHER TOOLS AND PROCESSES THAT PRESERVE AND ENRICH OUR LIVES. SPACE TECHNOLOGY—IT GAVE US THE MOON AND CONTINUES TO GIVE MORE THAN WE EVER IMAGINED. EVERY DAY.

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